EDITOR'S NOTE

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NO. 84 6182

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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SUPREME COURT, U.S.

WILLIAM EUTZY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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156P

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Eutzy v. State, 458 So.2d 755 (Fla. 1984) is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on September 20, 1984, and petitioner's timely motion for rehearing was denied on December 3, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Eighth and Fourteenth Amendments to the United States Constitution; see e.g. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

STATEMENT OF THE CASE

Petitioner, along with his sister-in-law, Laura Eutzy, was indicted for first degree murder in the death of Herman Hughley. The murder charge against Laura was subsequently dropped when the state failed to traverse her motion to dismiss. The state then filed an information charging Laura with possession of a concealed weapon. In petitioner's murder trial, Laura testified against petitioner with the understanding that the state would recommend that she receive probation on the concealed weapon charge.

On July 7, 1983, the jury returned a verdict finding petitioner guilty of first degree murder with premeditation. The same afternoon, following the penalty phase of the trial, the jury recommended that petitioner be sentenced to life imprisonment without possibility of parole for twenty-five years. The next morning, the trial court rejected the jury's recommendation and sentenced petitioner to death.

The Supreme Court of Florida, on September 20, 1984, affirmed petitioner's conviction and death sentence. Justice McDonald dissented, without written opinion, from the affirmance of the death

sentence. Petitioner's timely motion for rehearing was denied on December 3, 1984. Justice McDonald, joined this time by Justice Overton (who was in the majority in the original decision), dissented from the denial of rehearing, again without written opinion.

The facts material to the questions presented in this petition require some discussion.[1] The most critical is the fact that the shooting death of Herman Hughley occurred at the end of an inexplicable (or, at any rate, unexplained) four hour taxicab ride from Pensacola to Panama City and back, taken for no apparent reason. The three individuals present during this ride were the slain cab driver, Herman Hughley; petitioner, William Eutzy, who did not testify at trial; and his sister-in-law, Laura Eutzy, who claimed not to have been present when the murder occurred, and who claimed to have been asleep during most of the four hour ride. As the Florida Supreme Court appeared to recognize at one point in its opinion, there is an "utter void in the record that payment [for the ride] was not made or that any robbery occurred."[2] Eutzy v. State, supra, at 758. The state produced no evidence that any money was taken from Hughley, no evidence as to whether he had any cash prior to picking up petitioner and Laura Eutzy, no evidence as to whether he habitually carried any cash, and no evidence as to whether there was any money on his person when he was found dead

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1 A more detailed summary of the evidence in this case is contained in petitioner's brief on appeal. See Appendix G 2-19.

2 The only evidence which even remotely supports the state's theory of motive in this case is Laura's testimony that petitioner had said he would take care of the fare; that when he returned to the hotel she asked him if he had taken care of it; and petitioner told her that "he hit the cab driver and knocked him out, but he didn't hurt him." But, as petitioner contended in his initial brief [Appendix G 29-30], and as the Florida Supreme Court appears to have recognized [see Eutzy v. State, supra, at 758 and 759], there was a strong likelihood that the jury had doubts about the veracity of Laura's testimony. Such doubts would not be inconsistent with the jury's guilt phase verdict finding petitioner guilty of first-degree premeditated murder since they could have disbelieved Laura entirely and still convicted appellant based on the testimony of Jackie Humel and the firearms examiner. The circumstances of the premeditated murder, however, were not established by the skeletal evidence presented by the state, and whatever minimal evidence there was as to what actually occurred was totally dependent on the testimony of Laura Eutzy. As the Florida Supreme Court observed, there is an evidentiary void as to whether a robbery occurred and as to whether payment was made for the cab ride.

in the cab. Laura Eutzy "believed" that petitioner had only five dollars, but she admitted that she did not know for a fact how much money he had, or whether he had any. The state produced no evidence as to whether petitioner had any money when he was arrested. There was evidence that the round-trip to Panama City would probably cost about $135.00, and that cab drivers are supposed to collect the money up front, before leaving town on such a long trip. There was no evidence of any discussion between Hughley and petitioner about the fare.

The evidence at trial established that petitioner and Laura were stopped in the Pensacola airport shortly after midnight on Saturday, February 26, 1983, by a security guard, who asked them for identification. Petitioner showed him a government vehicle card in the name of Raymond Sanders, and Laura went into her purse[3] and produced a Louisiana driver's license in her correct name. At about 5:30 the following evening, the couple was seen getting into a taxicab driven by Herman Hughley. From that point, the evidence (as stated in the Florida Supreme Court's opinion), revealed the following:

> A dispatcher for the cab company for which Hughley drove testified that Hughley reported picking up a fare at the airport with a destination on Pensacola Beach. Forty-five minutes later, Hughley reported that the destination had been changed to Fort Walton; ten or twenty minutes later he notified the dispatcher that they were going to Panama City. Three-and-a-half hours after the last report, Hughley notified the dispatcher of his return. When the dispatcher asked him to repeat his message she got no response. Repeated attempts to reach Hughley were unsuccessful.
>
> Hughley's body was discovered in the front seat of his cab by a driver for the same cab company, Mary Beasley. She had seen Hughley with the Eutzy couple at the airport the evening before. Her curiosity was aroused when she drove past Hughley's cab, apparently deserted, on the edge of the Pensacola

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[3] The fact that the security guard testified that Laura went into her purse to produce her ID assumes importance in light of her denial, on cross-examination, that she ever had occasion to look in her purse during the entire weekend from Friday night through Monday morning. The pistol which was proven to be the murder weapon belonged to Laura and was found in her purse when she and petitioner were arrested. It was Laura's testimony that she believed that the gun was in her purse when they arrived in Pensacola; that she believed the gun was in her purse when they entered Herman Hughley's taxicab; and that she never noticed that it was missing until petitioner gave it back to her on Monday morning.

> Junior College campus. Other witnesses were able to testify it had been there since approximately the time of Hughley's last contact with his dispatcher.
>
> William and Laura Eutzy were picked up while trying to hitchhike out of town the day after Hughley's body was discovered. They had been spotted by Jackie Humel who was at that time on her way to the police department to make a statement in the Hughley case. She had seen Hughley and appellant at the spot where Hughley was later discovered dead at about the time Hughley radioed in his last report.
>
> Laura Eutzy had a pistol, later proven to be the murder weapon, in her purse at the time of her arrest. She testified before the grand jury and at Eutzy's trial that she had ridden in the back seat of the cab, sleeping off and on. Eutzy had sat in the front with Hughley. To the best of her knowledge, Eutzy had had only five dollars when they hired the cab; she had had no money. She did not know how they were going to pay the cab fare. Appellant said he would take care of it. When they returned to Pensacola, Eutzy had the cab driver drop Laura off at a Holiday Inn. He then rode off with Hughley. When appellant returned, Laura asked him if he had taken care of the fare. He answered in the negative and he told Laura he had hit the driver on the head with the gun but had not hurt him. Laura testified that she had not been aware that he had taken the gun until he returned it to her at that time. On the morning they were arrested, Laura read a story about Hughley's murder in the local newspaper and realized for the first time what had happened, according to her testimony.

Eutzy v. State, supra, at 756-57.

Several additional facts deserve mention. According to Officer Gary Meisen, Laura Eutzy initially told him that she did not arrive in Pensacola until a time which was after the murder of Herman Hughley had occurred. Later that afternoon, after a firearms examiner had positively identified the pistol taken from Laura's purse as the murder weapon, Officers Meisen and Burns confronted her with this information, at which time she changed her story "in some respects".

Officer James Richbourg testified that the gun which was removed from Laura Eutzy's purse, along with the single bullet removed from the body of Herman Hughley and an expended cartridge case recovered from the floorboard of the taxicab, were sent to Tallahassee for testing. Seven more rounds of ammunition were removed from the weapon, and there were twelve additional rounds in Laura Eutzy's purse. Eleven of these rounds were wrapped in tissue paper and there was one loose round. In addition to the pistol and the live cartridges, Laura Eutzy's purse contained the following items: one brush, four ink pens, one piece of paper with writing on it, five earrings, one

bottle of perfume, two lipsticks, one bottle of nail glaze, one powdered eyeshadow, one mascara, four lighters, one nail clipper, two nail files, a pair of tweezers, a bottle of skin lotion, a coupon, a key, a box of No-Doz with two tablets, a case of Demulen with eight tablets, a fuse, five barrettes, an eyeglass repair kit, a jewelry case, a pack of gum, two necklaces, a razor case and razor, a St. Christopher medal, a high school medal, two Eastern luggage tags, a travel pamphlet, two gold rings and a silver band, an address case, a calendar, an envelope containing two letters from the Division of Motor Vehicles, seven pictures, a birth certificate, a marriage certificate, a letter from Harmon and Cats (sic), a receipt, a wallet with miscellaneous papers, a driver's license in the name of John Carl Eutzy, two social security cards in the name of Laura Eutzy and one on the name of John Eutzy, another gold ring, and a pamphlet on the RG-26 automatic pistol. Officer Richbourg testified that he could see the pistol in the center of the purse as he opened it, without any difficulty.

Laura Eutzy testified that she and her brother-in-law arrived in Pensacola on Friday night, February 25, 1983, on their way to Missouri. Earlier that month she had bought a gun in Slidell, Louisiana, because petitioner had recommended that she buy one for protection. She believed that the gun was in her purse when they arrived in Pensacola. On cross-examination, Laura gave the following testimony:

> MR. LANG [defense counsel]: When was the last time you looked in your purse?
>
> LAURA: Before we ever got to Pensacola.
>
> MR. LANG: When was the first time, a week before you got to Pensacola?
>
> LAURA: I really couldn't say.
>
> MR. LANG: Now, you have got quite a number of things in your purse, cosmetics, lipstick and all that sort of stuff. You are saying you never went in your purse from before you got to Pensacola until the time you left and got arrested.
>
> LAURA: No.
>
> MR. LANGE: When was the last time, if you can recall, when you went into your purse? Do you go into your purse when you go into the bathroom?

LAURA: No; there is nothing in it for me to really, you know, get into my purse . . .

MR. LANG: In your purse you had a bottle of perfume, lipstick, nail glaze, eyeshadow, mascara, nail clippers, fingernail file, skin lotion, gun and all these things. You never went into your purse a single time that you recall?

LAURA: No.

MR. LANG: You never go into your purse when you go into the bathroom?

LAURA: No.

MR. LANG: The gun that has been shown to you as being the gun that you purchased and was in your purse that you carried with you, with the shells, have you had an occasion to hold it and feel it?

LAURA: Yes.

MR. LANG: You can tell us that you don't know if that gun was in your purse or not?

LAURA: No. The weight, with everything in my purse . . . there are a lot of weight to my purse.

MR. LANGE: And you never, one time, to the best of your knowledge, from Friday or Saturday, all day Saturday, all day Sunday, Sunday night or Monday ever looked in your purse?

LAURA: No; I did not.

Laura testified that she had her purse with her during the entire time she was in the back seat of the cab. She stated that a couple of times at the airport on Saturday morning she gave the purse to petitioner to hold while she went to the restroom. However, she acknowledged having told the police that the purse had never left her possession. Laura further admitted that in her initial statements to the police she did not mention anything about going to Panama City, and did not mention petitioner's remark about hitting and knocking out the cab driver. She <u>did</u>, however, tell the police that she had seen the gun in petitioner's waistband <u>on Saturday night</u>, (contrary to her testimony that she never knew that the gun was missing from her purse until petitioner returned it on Monday morning). She testified that all the officers coming in and out of the room had her confused, and she had no idea why she would have said that petitioner had the gun in his waistband on Saturday night.[4]

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[4] This last statement is particularly hard to fathom in light of Laura's insistence that she was lying to the officers <u>in order to protect petitioner.</u>

On redirect examination, Laura testified that she did not tell the truth to the police in her first two statements because she was trying to protect petitioner, and also to protect herself. She testified that she told the truth in her third statement to police, in her Grand Jury testimony, and now at trial. On re-cross, Laura acknowledged that after she testified before the Grand Jury, the Grand Jury returned an indictment charging her with first-degree murder.

The trial court, in rejecting the jury's life recommendation and imposing a sentence of death, made the following oral findings:

> Well, the Court finds, based upon the evidence and certified copy of the record of conviction of the Defendant for robbery, in the Defendant's statement to the Corrections' officer or booking officer that the record will substantiate he has been convicted of the crime of robbery on a prior occasion, and the Court finds that the evidence does substantiate the Defendant has been convicted of a prior offense involving use or threat of violence to a person to wit robbery. That is a felony and that is an aggravating circumstance.
>
> Based on the evidence in this case and the cicumstances, the Court finds the Defendant was, at the time of the homicide, even though the Jury did not so find, was committed while in the course of a robbery. The evidence reflecting that the Defendant and his associate or friend had between them only five dollars ($5.00), and that they took the cab from the [Municipal] Airport to a trip to Pensacola Beach, Ft. Walton, and possibility ... possibility of Panama City. The testimony being the cost of the trip, one-way, to Panama City could be as much as ninety dollars (90.00). Though it could be a negotiable ... to a degree, and the Defendant's actions in having the cab-driver return his associate or friend to the University Mall Holiday Inn, and going away with the driver and having at some time taken the death weapon , a .25 caliber pistol from the handbag of the associate or friend was at least manifesting an attempt at that time or formulating the idea of robbery, and which appears to be the [Motivating] factor. Of course, in this offense and, in fact, a robbery was committed.
>
> Another aggravating circumstance. The crime for which the Defendant should be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Again, the circumstances in the case bear out the Defendant, at some time prior to the instance, took from his associate or friend a .25 caliber automatic pistol, which was the death weapon, and left his friend or associate at the Holiday Inn at University Mall, and proceeded with the victim to the murder spot, which was some few miles from the Holiday Inn. That the victim was seen by one of the witnesses, a female, the Court can't remember distinctly her name. Seems to me like it was Hamel or Humel or something to that extent. I don't remember the exact name, but it was a female,

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5 As previously mentioned, the murder charge against Laura was dropped when the state failed to traverse her motion to dismiss. Laura testified against petitioner with the understanding that the state would recommend that she receive probation on the charge of carrying a concealed weapon.

> a young girl. Which based on the evidence was a short time before the victim was killed. The evidence will show that the way in which the victim was killed will indicate no altercation or struggle.
>
> Now, the ballistics expert, having testified that based on the powder residues on the victim's cap band that the death missile was fired from the weapon just a few inches from the point of entry. And the pathologist's report was that the victim was shot in the back of the head on the right side.
>
> The Court's finding bears out a term for which the Defendant is to be sentenced. Was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. The Court therefore finds there are three aggravating circumstances in this case, while there were not mitigating circumstances at the penalty phase nor any evidence of circumstances during the trial of the substantive phase of this case of any mitigating circumstances.
>
> Based upon these findings, the Court feels this Defendant has committed First Degree Capital Murder, and it's the sentence of the Court, in the judgment of the law, that this Defendant shall be handed the capital punishment sentence. He should be taken to [Raiford] and be executed at a time to be determined by the Governor of the State of Florida by electrocution. [Emphasis supplied].

In affirming petitioner's death sentence, the Florida Supreme Court concluded that the aggravating circumstance based on the trial court's finding that the killing occurred in the course of a robbery could not be supported by the record. In reaching this conclusion, the court emphasized "the utter void in the record that payment was not made or that any robbery occurred." The court "noted in passing" that the evidence would have been sufficient to support a finding that the murder was committed for pecuniary gain. [The court's observations are clearly self-contradictory, since the only conceivable basis for a finding of "pecuniary gain" would be if petitioner killed the cab driver to avoid paying for the ride, and as the court recognized, not only did the evidence fail to show that this was the motive for the murder, it failed even to show that payment for the ride was not made]. However, since the trial court did not make such a finding, the court purported to ignore it in reviewing the propriety of the override of the jury's life recommendation. The Florida Supreme Court approved the two remaining aggravating circumstances found by the trial court; the finding that the murder was committed in a cold, calculated, and premeditated manner (which petitioner strenuously contested), and that petitioner had previously been convicted of a violent felony

(a 1958 Nebraska robbery conviction, which petitioner did not contest). The court "rejected as unreasonable those considerations which may have influenced the jury's recommendation of life." Eutzy v. State, supra, at 760. Among the factors which were argued by petitioner as reasonable bases for the jury's life recommendation were (1) the jury might reasonably have found only one aggravating circumstance - the 1958 robbery conviction - and concluded that the aggravating factors in this case were insufficient to set this crime apart from the norm of capital felonies or to warrant imposition of the death penalty, regardless of the presence or absence of mitigating circumstances [see Appendix G 21-24,28,31-32, 32-36]; (2) the jury might reasonably have been influenced toward a life recommendation by the absence of the "especially heinous, atrocious, or cruel" aggravating circumstance [see Appendix G 25-28]; (3) the jury may have considered petitioner's age (43 at the time of trial) as a mitigating circumstance, in light of defense counsel's argument that a life sentence would guarantee that he would not even be eligible for consideration for parole until he was nearly seventy years old [see Appendix G 28-29]; (4) the jury could reasonably have had serious doubts about the credibility of Laura Eutzy's testimony, and while there was other evidence (notably the testimony of Jackie Humel coupled with that of the firearms examiner) which could support a guilty verdict, there was no evidence as to the circumstances of the crime other than the thoroughly impeached testimony of Laura [see Appendix G 29-30]; and (5) the jury could have been influenced toward a life recommendation by the extremely lenient treatment which the state accorded Laura in exchange for her testimony against petitioner [see Appendix G 30].[6] Petitioner further argued that the trial court's sentencing order was not based on any information which was unavailable to the jury, that there was no indication that the jury was misled or unduly influenced by emotion, and that the trial court expressed no compelling reasons for deviating from

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[6] Each of the aforementioned considerations was brought to the jury's attention by defense counsel in his closing argument in the penalty phase.

the jury's recommendation[7] [see Appendix G 30].

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal, petitioner raised five points. First, he asserted that the death sentence imposed notwithstanding the jury's recommendation of life, under the circumstances of this case, violated the Eighth and Fourteenth Amendments to the United States Constitution, as well as the principles established in Tedder v. State, 322 So.2d 908 (Fla. 1975). Petitioner suggested at least five considerations submitted to the jury by defense counsel which, individually and in combination, provided a reasonable basis for the jury's decision to recommend life (App. G 19-30]. The Florida Supreme Court, applying the amorphous standard of review which it has apparently adopted in the wake of this Court's decision in Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340 (1984), rejected each of these considerations as "unreasonable". [In the instant petition, petitioner contends, inter alia, that the standard of review employed by the Florida Supreme Court in cases in which death sentences were imposed notwithstanding jury life recommendations, particularly in the seven months since Spaziano was decided, is arbitrary, capricious, and violative of the Eighth and Fourteenth Amendments].

In his second and third points on appeal, petitioner challenged the trial court's findings of the aggravating circumstances that the murder was committed in a "cold, calculated, and premeditated manner" [Appendix G 31-32] and that the murder ws committed in the course of a robbery [Appendix G 32-36]. The Florida Supreme Court held that the evidence failed to support the finding that a robbery was committed. However, the court upheld the finding of the "cold, calculated, and premeditated" circumstance, based on its conclusion that the circumstantial evidence was sufficient to prove simple premeditation, and that the court could "find no reasonable hypothesis inconsistent with the heightened premeditaion required by

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[7] Interestingly, the only area of disagreement with the jury mentioned in the trial court's order was that he believed, "even though the jury did not so find", that a robbery was committed [see Appendix F]. The trial court's conclusion on this point was expressly rejected by the Florida Supreme Court as unsupported by the evidence.

this factor." Eutzy v. State, supra, at 758. On rehearing, petitioner contended that the Florida Supreme Court had unconstitutionally shifted the burden to petitiioner to disprove the heightened level of premeditation required to establish this aggravating circumstance [Appendix B 2-4]. Petitioner further contended that, under established precedent, the Florida Supreme Court's disapproval of an aggravating circumstance (i.e. the "course of a robbery" finding) relied on by the trial judge in overriding the jury's life recommendation required at minimum that the case be remanded for reconsideration of the death sentence by the trial court so that the remaining aggravating circumstances could be weighed against the recommendation of the jury. Lewis v. State, 398 So.2d 432 (Fla. 1981); see also Williams v. State, 386 So.2d 538, 543 (Fla. 1980) [Appendix B 4-5]. Rehearing was denied by the Florida Supreme Court, with two justices dissenting.

The fourth issue raised on appeal was that the trial court's instructions to the jury in the penalty phase were constitutionally deficient, in that (inter alia) they failed to inform the jury of the nature and function of mitigating circumstances [Appendix G 37-40]. Anticipating that the Court might consider the errors to have been rendered "harmless" by the jury's life recommendation, petitioner pointed out that this would be true only if the jury's life recommendation were given effect; otherwise a "harmless error" finding would be tantamount to saying that the jury does not need to be properly instructed because its recommendation is meaningless anyway [Appendix G 39-40]. To the contrary, the Florida Supreme Court has held that a capital defendant has a right to a jury advisory opinion; that the jury's recommendation is entitled to great weight; that the trial judge may not frustrate this important jury function; and that "a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors" cannot be condoned. Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). Nevertheless, in the instant case, the Florida Supreme Court refused to consider the merits of the issue, holding only that since the jury recommended life, any defect in the instructions were harmless. Eutzy v. State, supra, at 757.

Finally, petitioner argued that the provision in Florida's death penalty statute which authorizes the trial court to override the jury's recommendation of life is unconstitutional [Appendix G 40-48]. The state, in its answer brief, chose not to address this argument on the merits, but instead argued only that petitioner had waived the issue by failing to raise it prior to trial [Appendix I 23-24]. In his reply brief, appellant responded, inter alia, that the Florida Supreme Court had in previous decisions addressed on direct appeal the merits of constitutional objections to imposition of the death penalty notwithstanding the jury's life recommendation, and had not applied a "contemporaneous objection" rule to avoid consideration of this fundamental issue. Thus, petitioner continued, if the Florida Supreme Court were to now decline to consider the merits of his constitutional argument based on the state's claim of procedural default, this would amount to a novel application of the contemporaneous objection rule and would not preclude federal review in any event. See e.g. NAACP v. Alabama ex rel Flowers, 337 U.S. 288, 301, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964) [Appendix H 5]. Nevertheless, the Florida Supreme Court accepted the state's invitation, and held that the unconstitutionality of the life override provision was not timely raised in the trial court and thus was not preserved for appeal. Eutzy v. State, supra, at 757.

REASONS FOR GRANTING WRIT
QUESTIONS PRESENTED

QUESTION I

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S FINDING OF THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE, AND IN AFFIRMING PETITIONER'S DEATH SENTENCE WHICH WAS PREDICATED LARGELY ON THE FINDING OF THAT AGGRAVATING CIRCUMSTANCE, UNCONSTITUTIONALLY SHIFTED THE BURDEN TO PETITIONER TO DISPROVE THE HEIGHTENED LEVEL OF PREMEDITATION REQUIRED TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE.

In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), the Florida Supreme Court rejected a constitutional challenge to subsection (5)(i) of the state's death penalty statute, which establishes the "cold, calculated, and premeditated" aggravating circumstance:

> Regarding Jent's second sentencing claim, he alleges that every person convicted of premeditated murder will start the sentencing proceeding with one aggravating circumstance already established. This, Jent

> argues, will violate due process by forcing the defendant to prove lack of premeditation in the sentencing phase of the trial. We do not agree that this will occur. As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the [guilt] phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification."

As Justice Ehrlich observed in his separate opinion (concurring in part and dissenting in part) in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984), loss of the "very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.141(5)(i) ... would bring into question the constitutionality of that aggravating factor, and, perhaps, the constitutionality, as applied, of Florida's death penalty statute" [Emphasis in opinion].

Since Jent, the Florida Supreme Court has repeatedly made it clear that premeditation alone is not sufficient to support a finding of the (5)(i) aggravating circumstance. See e.g. Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984) and cases cited therein. Rather, the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). In Preston v. State, supra, for example, the Florida Supreme Court affirmed the defendant's conviction of first-degree premeditated murder, holding that the circumstantial evidence, including the nature and manner of the wounds inflicted on the victim, was sufficient to support a finding of premeditation. However, the court recognized that this circumstantial evidence was not sufficient to prove the heightened form of premeditation required by the (5)(i) aggravating circumstance, and disapproved the trial court's finding of that circumstance. The court indicated that the (5)(i) aggravating circumstance had been held applicable "where the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Preston v. State, supra, at 946.

Similarly, in the present case, the circumstantial evidence, including the fact that the victim was shot one time in the head with no sign of a struggle, was legally sufficient to support a finding of premeditation for a conviction of first degree murder [see e.g. Preston v. State, supra; Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975); Larry v. State, 104 So.2d 352, 354 (Fla. 1958)], and petitioner has never contended otherwise. But, as recognized in the earlier Florida cases, proof of something more than simple premeditation is needed to sustain a finding of the "cold, calculated, and premeditated" aggravating circumstance. In the present case there was no proof, circumstantial or otherwise, of a "particularly lengthy, methodic, or involved series of atrocious events" or a "substantial period of reflection and thought by the perpetrator" or any other kind of "heightened" premeditation. What the record does show is a four hour cab ride, taken for no apparent reason, following which (taking the evidence in the light most favorable to the verdict) petitioner shot the driver to death. At trial and on appeal, the state has advanced a rather remarkable theory as to motive - that petitioner formulated a plan as early as Saturday afternoon in the airport to secretly remove his sister-in-law's gun from her purse, take a pointless four hour cab ride to Panama City and back, and then shoot the cab driver in lieu of paying the fare. This might indeed amount to a "cold, calculated, and premeditated" homicide if this theory were based on evidence rather than speculation, but, as even the Florida Supreme Court appears to have recognized, it was not. Petitioner did not testify at trial. Herman Hughley, the victim, could not testify. The state's key witness, Laura Eutzy, claimed not to be present when the murder occurred and claimed to be asleep during most of the cab ride. Thus, for the four hour period immediately preceeding the commission of the crime, the record reveals absolutely nothing about what may have taken place among the persons involved. Moreover, the state produced no evidence that any money was taken from Hughley, no evidence as to whether he had any cash prior to picking up petitioner and Laura Eutzy, no evidence as to whether he habitually carried any cash, and no evidence as to whether there was any money on his person when he was found dead in the cab.

Laura Eutzy "believed" that petitioner had only five dollars, but she admitted that she did not know for a fact how much money he had, or whether he had any. The state produced no evidence as to whether petitioner had any money when he was arrested. There was evidence that the round-trip to Panama City would probably cost about $135.00, and that cab drivers are supposed to collect the money up front before leaving town on such a long trip. There was no evidence of any discussion between Hughley and petitioner about the fare. As the Florida Supreme Court's opinion correctly observes, there is "an utter void in the record that payment was not made or that any robbery occurred." Eutzy v. State, supra, at 758.

Instead of recognizing that this evidentiary void precluded a finding of the (5)(i) aggravating circumstance, however, the Florida Supreme Court appears to have equated circumstantial evidence of premeditation (for a conviction) with circumstantial evidence of heightened premeditation (for the aggravating circumstance), and shifted the burden of proof to apoellant to disprove the heightened level of calculation or planning in order to avoid a finding of the aggravating circumstance. Noting "that the evidence is clear that Eutzy procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of struggle", the court went on to conclude:

> The jury convicted Eutzy of first-degree premeditated murder, and Eutzy raises no objection to the sufficiency of the evidence, albeit circumstantial, to support that verdict. Accepting the evidence of premeditation, we can find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor.

Eutzy v. State, supra, at 758.

What the Florida Supreme Court has done, in so holding, is to shift the burden to the accused to disprove the element of a "heightened degree of premeditation, calculation, or planning" required to establish the aggravating circumstance, where the circumstantial evidence may be legally sufficient to show premeditation but does not reveal one way or the other whether the premeditation was "heightened" or "simple". As the court recognized, there was an utter void in the record that the cab driver was not paid or that any robbery occurred. There was also a four hour gap in the

evidence, covering the period immediately preceeding the murder - the entire period of time petitioner and Laura spent with Herman Hughley - which revealed nothing about what may have occurred. The practical effect of the Florida Supreme Court's misallocation of the burden of proof is to penalize petitioner for the gaps in the state's proof. Because the state introduced legally sufficient circumstantial evidence of premeditation to support a conviction of first degree murder, and because petitioner was unable to demonstrate to the court's satisfaction that there was not "a particularly lengthy, methodic, or involved series of atrocious events" or "a substantial period of reflection and thought by the perpetrator" [see Preston v. State, supra], the court upheld the aggravating circumstance.[8]

The Florida Supreme Court, in relying heavily on the (5)(i) aggravating circumstance to affirm petitioner's death sentence notwithstanding the jury's life recommendation, found it necessary to do what it promised not to do in Jent and what Justice Ehrlich warned against in Herring - it has blurred the distinction between the simple premeditation needed for a conviction and the heightened premeditation needed to sustain the aggravating circumstance. As so interpreted, Florida's "cold, calculated, and premeditated" aggravating circumstance is unconstitutionally overbroad and violative of the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Further, shifting the burden of proof to the accused to disprove the critical element of a heightened degree of premeditation, where the circumstantial evidence is legally sufficient to establish premeditation, but where there is no evidence, direct or circumstantial, to prove one way or the other whether the degree of premeditation was "heightened" or "simple", violates the due process clause of the Fourteenth Amendment. See Mullaney v. Wilbur, 421 U.S. 684, 95

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[8] Interestingly, the Florida Supreme Court paid absolutely no attention to the point made both in petitioner's initial brief [Appendix G 22-25,28,32] and in his motion for rehearing [Appendix B 1-2] that, under the Tedder standard used in life override cases, the issue which should be addressed is not whether the evidence was legally sufficient to support the judge's finding of the "cold, calculated, and premeditated" circumstance, but rather whether the jury could be labeled unreasonable for declining to find it. Under the evidence in this case, it is both reasonable and highly likely that the jury found nothing in aggravation except a single 1958 robbery conviction.

S.Ct. 1881, 44 L.Ed.2d 508 (1975); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

QUESTION II

THE FLORIDA SUPREME COURT, IN AFFIRMING PETITIONER'S DEATH SENTENCE NOTWITHSTANDING THE JURY'S LIFE RECOMMENDATION AND THE INVALIDATION OF AN AGGRAVATING CIRCUMSTANCE EXPRESSLY RELIED ON BY THE TRIAL JUDGE IN REJECTING THE JURY'S RECOMMENDATION, HAS ADOPTED AN INTERPRETATION OF ITS ELLEDGE "HARMLESS ERROR" RULE WHICH VIRTUALLY ENSURES THAT DEATH SENTENCES WILL BE CARRIED OUT IN AN ARBITRARY AND CAPRICIOUS MANNER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Barclay v. Florida, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1134 (1983), this Court held that the "harmless error" test employed by the Florida Supreme Court in death penalty cases - known as the Elledge rule[9] - was constitutionally permissible. This Court's conclusion was based in large part on the assumption that the Florida Supreme Court observed two safeguards in applying its "harmless error" rule. First, "[i]f the trial court found that some mitigating circumstances exist, the case will generally be remanded for resentencing". Barclay v. Florida, supra, 77 L.Ed.2d at 1147. Secondly, this Court said:

> The Florida Supreme Court has placed another check on the harmless error analysis permitted by Elledge. When the jury has recommended life imprisonment, the trial judge may not impose a death sentence unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, at 910. In Williams v. State, 386 S.2d 538, 543 (Fla. 1980), and Dobbert v. State, 375 So.2d 1069, 1071(Fla. 1979), the Florida Supreme Court reversed the trial judges' findings of several aggravating circumstances. In each case at least one valid aggravating circumstance remained, and there were no mitigating circumstances. In each case, however, the Florida Supreme Court concluded that in the absence of the improperly found aggravating circumstances the Tedder test could not be met. Therefore it reduced the sentences to life imprisonment.[10]
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> Barclay v. Florida, supra, 77 L.Ed.2d at 1147-48.

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[9] See Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977).

[10] This statement is correct as to Williams, but incorrect as to Dobbert. The Florida Supreme Court affirmed Dobbert's death sentence in the above-cited opinion, and he has since been executed. However, there are several other cases in which the court reversed death sentences where one or more (but not all) of the aggravating circumstances found by the trial court in imposing a death sentence notwithstanding the jury's life recommendation were invalidated, and where the trial court found no mitigating circumstances. See e.g. Richardson v. State, supra; Lewis v. state, infra.

The rationale of the Elledge rule, as explained by Justice Sundberg, is that the trial court's error in considering an invalid aggravating circumstance is harmful if it may have affected the weighing process as between the death penalty and a life sentence, and harmless only if it could not have affected that process:

> State v. Dixon, 283 So.2d 1 teaches that:
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> ...[T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present...." 283 So.2d at 10.
>
> It this be so, then regardless of the existence of other authorized aggravating factors we must guard agaisnt any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

Elledge v. State, supra, at 1003.

In Elledge, the trial court found no specific mitigating circumstances, but he stated in his sentencing order that he had found insufficient mitigating circumstances to outweigh the aggravating circumstances. The Florida Supreme Court concluded that, in order to have weighed the mitigating factors, the trial court implicitly must have found some to exist. The appellate court then asked rhetorically:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered. ... This result is dictated because, in order to satisfy the requirements of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied) Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913.

Elledge v. State, supra, at 1003.

Where the jury has recommended life, and where (as here) the trial court has expressly relied on one or more invalid aggravating circumstances in justifying his decision to reject the jury's recommendation and impose death, how can the Florida Supreme Court purport

to "know" that the trial court's weighing process was not affected?

In his rambling sentencing order in the instant case, the trial court stated, inter alia:

> That based upon the evidence in this case and the circumstances the Court finds the defendant was at the time of the homicide, even though the jury did not so find, was committed while in the course of a robbery, the evidence reflecting at the time, the defendant and his associate or friend had between them only $5.00, that they took the cab from the municipal airport for a trip to Pensacola Beach, Fort Walton and possibility Panama City. The testimony being that the cost of a trip one way to Panama City could be $90.00 though it could be negotiable to a degree and the defendant's actions in having the cab driver return his associate or friend to the University Mall Holiday Inn and going away with the driver and having at some time taken the death weapon, the .25 caliber pistol from the handbag of the associate or friend was at least an intent at that time of formulating the idea of robbery and appears to be the motivating factor or course in this offense and in fact a robbery was committed.

[Appendix F 1] [Emphasis supplied].

As previously discussed, the Florida Supreme Court agreed with petitioner that the "course of a robbery" aggravating circumstance was improperly found, and further recognized that there was an "utter void" in the evidence that the cab driver was not paid. Yet the Florida Supreme Court, applying its mutant version of the Elledge rule, affirmed petitioner's death sentence anyway. In other words, even though the Florida Supreme Court recognized that the theory of how and why this crime occurred which the trial court relied on in rejecting the jury's life recommendation was not supported by any evidence, it still concluded that the jury (which apparently did not find the improper aggravating circumstances) was as a matter of law "unreasonable", and that the trial court, who expressly relied on the improper aggravating circumstances in explaining his disagreement with the jury, would necessarily have made the same decision to override the jury's life recommendation, even had he not considered the unproven factors at all.

Clearly, the weighing process which resulted in petitioner's death sentence was profoundly affected by the trial court's consideration of the invalid aggravating circumstance and the unproven "motive". As the Florida Supreme Court has repeatedly pronounced, the jury's recommendation of life, while not binding, is entitled to great weight. See e.g. Tedder v. State, supra, at 910; McCampbell

v. State, 421 So.2d 1072, 1075 (Fla. 1982); Richardson v. State, supra, at 1095; and even Eutzy v. State, supra, at 758. Under Florida law, where there are some aggravating circumstances and no mitigating circumstances, death is presumed to be the appropriate sentence. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). However, a "jury's recommendation of life imprisonment militates against such a presumption." Williams v. State, 386 So.2d 538, 543 (Fla. 1980). The life recommendation is in and of itself a factor weighing heavily in favor of a life sentence, which must either be given effect, or, at the very least, weighed carefully against the aggravating circumstances found by the trial court. See Lewis v. State, 398 So.2d 432 (Fla. 1981)(where several aggravating circumstances were rejected by the Florida Supreme Court and where no mitigating circumstances were found, the court remanded the case "for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury"). In order for a trial court's override of a jury's life recommendation to be sustained on appeal, the reasons for his rejection of the jury's recommendation must be compelling ones. See Burch v. State, 343 So.2d 831, 834 (Fla. 1977); Phippen v. State, 389 So.2d 991, 994 (Fla. 1980). Here, much of the reasoning expressed by the trial court for overriding the life recommendation was not only uncompelling, but also completely unsupported by the evidence, and the Florida Supreme Court held accordingly. The Florida court's application of a "harmless error" theory to affirm petitioner's death sentence, where the jury recommended life and where the trial court's decision to override was so clearly based on unproven facts and improperly considered circumstances, is arbitrary, irrational, and violative of the Eighth and Fourteenth Amendments.

In Patten v. State, ___ So.2d ___ (Fla. 1985)(case no. 61,945, opinion filed January 10, 1985),the jury had become deadlocked at six-six as to whether to recommend death or life imprisonment. Under Florida law, unless seven jurors agree to recommend death, the recommendation is life imprisonment. Rose v. State, 425 So.2d 521 (Fla. 1983). As in Rose, however, the judge in Patten erroneously gave the jury an "Allen charge"[11], informing them that they

[11] Allen v. United States, 164 U.S. 492 (1896)

should try to reach a majority verdict, and the jury ultimately returned a death recommendation. On appeal, the Florida Supreme Court reversed for a new penalty hearing, and said:

> We do not find it appropriate to treat the jury recommendation as a life recommendation and the trial judge's sentence as a jury override, as urged by the state. There was no life recommendation in this case and the trial court did not, therefore, consider this significant factor in his sentencing decision. To now treat the jury recommendation as a life recommendation and review appellant's sentence without the benefit of the trial judge's consideration and application of the Tedder doctrine would require this Court to make an assumption as to what sentence the trial judge would have imposed if the jury had actually returned a life recommendation. We decline to do so.

Where, as in the instant case, the trial court overrides the jury's life recommendation based on certain factual findings, and the appellate court determines on appeal that many of those factual findings (including the one upon which the trial court specifically expressed disagreement with the jury) are unsupported by any evidence, how can the appellate court simply assume that those findings made no difference in the judge's decision to impose death? (Especially when the appellate court is still paying lip service to the significance of the jury's recommendation and the great weight it is entitled to in the weighing process). Under the grossly overbroad interpretation of the Elledge rule which seems to have been adopted sub silentio in this and other recent "life override" decisions [see Question III, infra], it is apparent that the "safeguards" which were central to this Court's decision in Barclay have been discarded by the Florida Supreme Court.

QUESTION III

THE FLORIDA SUPREME COURT HAS ADOPTED A STANDARD OF REVIEW, IN CASES IN WHICH THE TRIAL JUDGE HAS IMPOSED THE DEATH PENALTY NOTWITHSTANDING THE JURY'S RECOMMENDATION OF LIFE, WHICH ENCOURAGES THE DENIGRATION OF MITIGATING FACTORS PROFFERRED BY THE ACCUSED, AND WHICH INEVITABLY PROMOTES THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

In Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340 (1984), this Court, in considering a constitutional challenge to the provision of Florida's death penalty law which authorizes the trial court to override the jury's life recommendation, made a threshold determination that Spaziano's "fundamental premise" was that the constitution requires jury sentencing in all capital cases.

Having thus defined the issue, this Court concluded by 6-3 vote that the constitution does not require jury sentencing, and upheld the Florida procedure largely on that basis.

Petitioner's fundamental premise, in contrast, is not that the constitution requires jury sentencing, nor does petitioner's argument have anything to do with double jeopardy. Rather, petitioner's fundamental premise is that the practice whereby Florida trial judges routinely ignore jury life recommendations, and the voluminous but wildly inconsistent body of case law which the Florida Supreme Court has developed as a result thereof, not only lends itself to arbitrary, capricious, unreasonable, and unfair imposition of the death penalty, it virtually guarantees it. As Justice Marshall recognized, in dissenting from the denial of certiorari in Heiney v. Florida, (no. 83-6994, decided October 15, 1985) (in which the trial court discounted the jury's life recommendation because he believed it was motivated by residual doubt as to guilt):

> Although this legal issue might arise in a sentencing scheme that respected the finality of a jury decision against death, it is not necessarily an accident that this case came from Florida's system, where judges may override jury decisions for life. In Spaziano, which upheld the Florida system, the dissent cited data showing that judges are usually more likely to impose death than are juries. Ibid. Where fully informed and rational juries decide that death is inappropriate, a judge's override rarely if ever shows that, in spite of the jury, there was really no reasonable doubt but that death was appropriate. It is far more likely that the override decision simply fails to account for the more intangible or less traditionally "legal" elements of mitigation that informed a jury's decision. This case seems a clear illustration. Indeed, the Spaziano dissent correctly suspected that a system of death sentencing by judges - "trained to distinguish proof of guilt from questions concerning sentencing" - would be less likely to recognize this valid mitigating circumstance. Ibid.
>
> Eddings and Lockett entitle a defendant to a sentencer who can consider all mitigating circumstancs, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life - as this court did in Spaziano - not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

In the present case, defense counsel suggested five factors to the jury which it might consider in deciding whether to recommend life or death.[12] First and probably foremost, he argued that they should find only one aggravating circumstance - the 1958 Nebraska robbery conviction - and accord it relatively little weight. In other words, the jury was asked to consider whether this crime was really beyond the norm of capital felonies so as to require imposition of the death penalty. Is this an "unreasonable" consideration? The Florida Supreme Court has recognized, in McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977) that juries, under Florida's death penalty statute, "have been reluctant to recommend the imposition of the death penalty in all but the most aggravated cases . . . ." See also State v. Dixon, supra, at 9; Tedder v. State, supra; Provence v. State, supra; Williams v. State, supra; Phippen v. State, supra. Can it be said that the evidence of the "cold, calculated, and premeditated" aggravating circumstance was so overwhelming that the jury could be labeled "unreasonable" for not finding it? [See Question I, infra]. In light of the absence of any evidence of what transpired during the four hours immediately preceding the shooting - and in light of the fact that even the Florida Supreme

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12 Note also that the prosecutor never objected to any aspect of defense counsel's argument to the jury. If the factors argued by defense counsel were truly "unreasonable", shouldn't the state be under the same obligation as the defense to make its objection known, and shouldn't the state's failure to object amount to a waiver? Compare Bassett v. State, 449 So.2d 803, 808 (Fla. 1984) (defense counsel's failure to object to improper prosecutorial argument in penalty phase precludes appellate review) with Porter v. State, 400 So.2d 5, 8 (Fla. 1981)(Alderman, J. Concurring) and Porter v. State, 429 So.2d 293,296 (Fla. 1983)(jury life recommendation which may have been based on defense counsel's reading a description of an electrocution was "unreasonable", even though defense counsel acted with the permission of the trial judge and without objection by the prosecutor.) Defense counsel is not ineffective, according to the Florida Supreme Court if he chooses to forego presentation of any mitigating circumstances, in order to maintain his client's innocence and preserve the integrity of his case. Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Unfortunately, however, if he chooses this course and is successful in convincing the jury to recommend life because the evidence does not conclusively foreclose the possibility of innocence, that life recommendation, as a matter of Florida law, is "unreasonable", so the judge is free to impose death. See Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Heiney v. Florida, supra (Justice Marshall dissenting from denial of certiorari). Florida "life override" caselaw is replete with such Catch 22s. Defense attorneys, in choosing a strategy to argue for their clients' lives, must be constantly wary of being sandbagged by an override if they argue anything beyond the traditional statutory mitigating categories.

Court recognized that there was no evidence to support either the robbery theory or the "avoid paying the fare" theory advanced by the state and relied on by the trial court - obviously not.

Defense counsel also suggested to the jury that it consider that if petitioner were sentenced to life imprisonment, he would be nearly seventy years old before even becoming eligible for parole (with no guarantee of it even then). The Florida Supreme Court gave this consideration short shrift. In addition to concluding as a matter of law that it is unreasonable "for the jury to consider in mitigation the probability that the defendant would no longer be a threat to society when he reentered it", the court also commented that ". . . the crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Petitioner submits that it is the Florida Supreme Court which mistakes the nature of mitigating circumstances. A state is constitutionally required to structure its capital sentencing procedure to permit consideration of the individual characteristics of the offender and his crime. California v. Ramos, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1171 (1983); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). It has been recognized that predictions regarding the defendant's potential future dangerousness, and predictions regarding the defendant's potential for rehabilitation, are relevant and constitutionally permissible considerations in capital sentencing. California v. Ramos, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982). In California v. Ramos, supra, this Court held that California's "Briggs Instruction", which informed the jury of the governor's power to commute a life sentence without possibility of parole to a lesser sentence which would include the possibility of parole, was both constitutionally permissible and relevant to the sentencing decision:

> By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior

> makes it undesirable that he be permitted to return to society.

California v. Ramos, supra, 77 L.Ed.2d at 1182.

Finally, it should be pointed out that Fla.Stat. 921.141(6)(g) establishes consideration of the age of the defendant as a statutory mitigating circumstance. In State v. Dixon, supra, at 10 (Fla. 1973) the Florida Supreme Court recognized that any age, "whether youthful, middle aged, or aged", may be considered by the jury in mitigation, and further observed that the judge and jury may consider "the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life". [In the present case, the only prior offense established by the state was a Nebraska robbery conviction dated 1958]. It can be seen that these mitigating considerations which the Florida Supreme Court has now discarded as a matter of law - on the ground that they fail to"ameliorate the enormity of the defendant's guilt" - were not exactly novel claims by petitioner. Rather, this aspect of the case again demonstrates the truth of Justice Marshall's observation:

> Eddings and Lockett entitle a defendant to a sentencer who can consider all mitigating circumstances, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life - as this Court did in Spaziano - not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

Meiney v. Florida, supra (Justice Marshall dissenting from denial of certiorari).

Two more non-statutory mitigating circumstances - related ones - which were denigrated by the trial court and the Florida Supreme Court, arise from the likelihood that the jury's life recommendation may have been motivated in whole or in part by their having serious doubts as to the credibility of Laura Eutzy's blatantly self-serving and thoroughly impeached testimony,[13] and by the extremely

[13] While there was other testimony which circumstantially supported a finding that petitioner committed the murder, there was no testimony other than Laura's which even remotely bore upon the circumstances of the crime.

lenient treatment[14] which the state accorded Laura in exchange for her testimony against petitioner. The Florida Supreme Court, characteristically, misconstrued petitioner's credibility argument, and said:

> Had it disbelieved Laura's testimony entirely, the jury could have inferred from the facts before it that Laura knew the defendant had taken the gun from her purse. This does not suffice to make her a principal in the first degree, equally as culpable of the homicide as the defendant.

Eutzy v. State, supra, at 759.

Petitioner's argument that the lenient treatment given to Laura could reasonably have been considered in mitigation by the jury was rejected as a matter of law:

> For a jury recommendation of life to be reasonable, based on lenient treatment accorded an accomplice, the jury must have been presented with evidence tending to prove the accomplice's equal culpability. Otherwise, the state, which often must rely on testimony of a defendant's unsavory companions in presenting evidence of a crime, would bear the burden of rehabilitating those witnesses and defending the legal propriety of treatment the jury might perceive as too lenient. The jury may reasonably compare the treatment of those equally guilty of a crime; it may not compare treatment of those guilty of a different, lesser crime in weighing the propriety of the death penalty. Because the record is devoid of any evidence which would show that Laura was a principal in the first degree in the murder, we must reject the argument that the jury's recommendation of life could reasonably have been based on the disparate treatment of Laura and William.
>
> No evidence of mitigating circumstances was presented for the jury to consider. We have rejected as unreasonable those considerations which may have influenced the jury's recommendation of life. . . .

Eutzy v. State, supra, at 760.

The Florida Supreme Court also stated that, in prior decisions in which it had upheld jury life recommendations, "[i]n every case, the jury has had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself." Eutzy v. State, supra, at 759. This statement sheds some interesting light on the quality and consistency of the appellate review afforded in capital cases by the Florida Supreme Court, in that two weeks before the instant opinion was issued, the Court reversed a death sentence imposed over a life recommendation in Thompson v. State, 456 So.2d 444, 448 (Fla. 1984) and said:

---

[14] By not traversing her motion to dismiss, the state allowed the first degree murder indictment against Laura to be dropped, and agreed to recommend that she receive probation on the concealed weapon charge.

> Finally, we note that the state's case relied heavily on the testimony of six witnesses, all of whom had some part in discussing, planning, or carrying out the attempted robbery, and that all either pled to reduced charges or received promises of assistance on other charges in return for their testimony. We do not suggest that these witnesses could be characterized as accomplices or that they coerced or dominated appellant. Neither do we suggest that this circumstance alone would necessarily overcome the two valid aggravating circumstances. However, we believe there were in this instance sufficient mitigating factors for the jury to reasonably conclude that the aggravating circumstances were overcome and that life imprisonment was a proper sentence.

Has it gotten arbitrary and capricious enough yet to implicate the Eighth and Fourteenth Amendments? In Spaziano v. Florida supra, 82 L.Ed.2d at 356, this Court said:

> We are satisfied that the Florida Supreme Court takes [the Tedder] standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. . . . Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.
>
> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case.

Petitioner submits that the examples set forth in this petition, and in this case, of the Florida Supreme Court's derogation of the jury's role and its cavalier rejection of a wide variety of mitigating factors; of the amorphous and arbitrary standard of review employed by that court in life override cases; of the court's chronic refusal, without explanation, to follow its own precedent as to capital sentencing issues; and of the court's application of a "harmless error" approach when the trial court bases its override of the jury's life recommendation on aggravating factors which the appellate court agrees were improperly considered, should convince this Court that Florida's "life override" practice, as interpreted by the Florida Supreme Court, does violate the Eighth and Fourteenth Amendments. And, in the seven months since Spaziano was decided, the standard of review appears to have become even looser and more capricious than before.

At the time petitioner's reply brief was filed in February, 1984, he was aware of 59 life override cases decided by the Florida Supreme Court. Twenty-one of these (36 per cent) were affirmed. Of the 21 affirmances, only one or possibly two did not include a valid

finding that the murder was "especially heinous, atrocious, or cruel". See e.g. Buford v. State, 403 So.2d 9[illegible], 954 (Fla. 1981) (recognizing that the trial court in that case, as in previous life override cases in which the Florida Supreme Court affirmed the death sentence, was "unquestionably . . . swayed by the extreme heinousness and atrocious of the crimes"). The only two exceptions were Sawyer v. State, 313 So.2d 680 (Fla. 1975), the earliest life override affirmance, and possibly Ziegler v. State, 402 So.2d 365 (Fla. 1981). [Sawyer's sentence was subsequently mitigated to life imprisonment by the trial court (which is no longer permissible under Florida law). Ziegler involved a particularly aggravated set of facts - a furniture store owner murdered his wife in order to collect a half million dollars in insurance benefits, and, in order to make the crime appear to be a robbery, also murdered his parents-in-law and a man named Mays, so as to have it appear that the killings occurred in the course of a robbery committed by Mays and others]. Only rarely was the Elledge rule applied in life override cases to that point. See Appendix G 25-28, Appendix H 5-6].

In the last seven months, in contrast, the Florida Supreme Court has affirmed five of the seven (71 per cent) life override cases it has decided. Gorham v. State, 454 So.2d 556 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Parker v. State, 458 So.2d 750 (Fla. 1984) ; Eutzy v. State, 458 So.2d 755 (Fla. 1984)(death sentence affirmed); Thompson v. State, 456 So.2d 444 (Fla. 1984); Rivers v. State, 458 So.2d 762 (Fla. 1984) (death sentence reversed). In its opinion in the instant case, the court wrote:

> First, appellant notes that in the vast majority of all cases in which this Court has affirmed the imposition of the death sentence in spite of a jury recommendation of life, there has been a finding that the murder was especially heinous, atrocious and cruel. While appellant's statistical compilation and case analysis is interesting and informative, we cannot agree that it is binding precedent for the proposition that a jury recommendation of life coupled with the absence of that particular aggravating factor destroys the trial judge's statutory authority to independently weigh the evidence in aggravation and mitigation and to impose sentence. Though always entitled to great weight, the jury's recommendation is only advisory. Under no combination of circumstances can that recommendation usurp the judge's role by limiting his discretion.

Eutzy v. State, supra, at 758-59.

Of course, petitioner never argued that the absence of the "heinous, atrocious, or cruel" circumstance was "binding precedent" or "destroys the trial judge's statutory authority". Petitioner simply argued that, perhaps in combination with other factors, the fact that the killing was not an especially heinous, atrocious, or cruel one was a reasonable thing for the jury to consider in deciding whether the crime warranted the death penalty. Unlike virtually all of the life override cases which had been affirmed previously, this case did not involve sexual assault; children or elderly people as victims; extreme physical brutality or torture, extreme mental anguish in anticipation of death,or multiple murders [see Appendix G 27]. Until July, 1984, you could virtually always distinguish the life override cases in which the death sentence was affirmed from those in which it was reversed by the presence or absence of this factor.

In the seven most recent life override decisions, however, three of the five cases in which the Florida Supreme Court affirmed the death sentence were not found to be especially heinous, atrocious, or cruel killings. In Gorham v. State, supra, the court rejected the trial court's findings of "heinous, atrocious, or cruel" and "cold, calculated, and premeditated", and affirmed the death sentence anyway on a "harmless error" theory. In Parker v. State, supra, the court rejected the trial court's findings of "heinous, atrocious, or cruel" and "course of a robbery", and affirmed the death sentence anyway on a "harmless error" theory. In the present case, Eutzy v. State, supra, the trial court did not find (nor could he have found) the "heinous, atrocious, or cruel" factor, the Florida Supreme Court rejected the "course of a robbery" finding and the theory as to motive on which the override was based, and affirmed the death sentence anyway on a "harmless error" theory. In Thomas v. State, supra (in which there was a valid finding of "heinous, atrocious, or cruel") the Florida Supreme Court struck one aggravating factor and (ignoring both safeguards in the Elledge rule) held the error "harmless" even though the jury recommended life and even though the trial court found two mitigating circumstances, that the defendant had no

significant record of criminal activity and that he was only twenty years old. Assuming arguendo that Florida's standard of review in life override cases did not appear to violate the Eighth and Fourteenth Amendments at the time Spaziano was decided, that is clearly no longer the case. It is also important to recognize that the Florida Supreme Court's decisions in Eutzy and the other recent life override cases not only fail to apply the constitutional principles established by this Court to prevent arbitrary and unreasoned imposition of the death penalty, these decisions also become precedent in Florida capital trials. Thus, on the authority of Eutzy, a Florida trial court must (for example) refuse to instruct the jury, and refuse to consider himself, any mitigating circumstance which he finds does not "ameliorate the enormity of the defendant's guilt". A clearer violation of the principles set forth in Lockett v. Ohio, supra, can hardly be imagined.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant this petition for writ of certiorari, or, in the alternative, summarily reverse petitioner's death sentence on any or all of the numerous grounds discussed in this petition.

Respectfully submitted,

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(904) 488-2458

Attorney for Appellant

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM EUTZY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPENDIX

STEVEN L. BOLOTIN
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ATTORNEY FOR PETITIONER

(MEMBER OF THE BAR
OF THIS COURT)

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was more than an afterthought,
as a motive for murder. This
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Williams v. State, 386 So.2d 538

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reason could differ. *Tedder v.*
.2d 908 (Fla.1975). The jury
proper and the facts of this
place it within the class of
which the death penalty has
propriate. *Spaziano v. Flor-*

(Cite as: 458 So.2d 755 (Fla. 1984))

ida, — U.S. —, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Accordingly, the sentence of death is affirmed.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., concur.

ADKINS, J., concurs in the convictions, but concurs in the result only of the sentence.

McDONALD, J., concurs in the convictions, but dissents from the sentence.

William EUTZY, Appellant,

v.

STATE of Florida, Appellee.

No. 64212.

Supreme Court of Florida.

Sept. 20, 1984.

Rehearing Denied Dec. 3, 1984.

Defendant was convicted in the Circuit Court, Escambia County, William S. Rowley, J., of first-degree murder, and he appealed. The Supreme Court held that there was insufficient evidence to support a finding as an aggravating circumstance that the murder occurred during the commission of a robbery, but since there was evidence to support the aggravating factors that the defendant had a prior conviction for robbery and that the murder in question was cold, calculated and premeditated, statutory authority was vested in the trial court to independently weigh the evidence in aggravation and mitigation and impose the death penalty after overriding the jury's advisory recommendation of life.

Affirmed.

McDonald, J., concurred in the conviction, but dissented from the sentence.

1. Criminal Law ⇐1030(2)

Issue whether the statutory authority granted a trial court to override a jury's recommendation of life was unconstitutional as applied was not timely raised before the trial court and, hence, was not preserved for appeal. West's F.S.A. §§ 812.012(3)(c), 812.014(1)(a), 812.13(1).

2. Homicide ⇐340(4)

Instructions during penalty phase of prosecution for first-degree murder, although allegedly erroneous, were harmless given fact that defendant received a jury recommendation of life imprisonment and thus received the more lenient of the two options before the jury. West's F.S.A. §§ 812.012(3)(c), 812.014(1)(a), 812.13(1).

3. Homicide ⇐354

Evidence indicating that defendant procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of struggle was sufficient to warrant finding in imposing death penalty that the murder was committed in a cold, calculated and premeditated manner. West's F.S.A. §§ 812.012(3)(c), 812.014(1)(a), 812.13(1).

4. Criminal Law ⇐1208.1(6)

Rule that every aggravating factor to warrant the death penalty must be proved beyond a reasonable doubt does not proscribe the use of circumstantial evidence so long as that evidence is inconsistent with a reasonable hypothesis which negates the aggravating factor. West's F.S.A. §§ 812.012(3)(c), 812.014(1)(a), 812.13(1).

5. Homicide ⇐354

Fact that cab fare was due and owing victim was insufficient, absent evidence that victim had anything of value with him, to warrant a finding that murder occurred during commission of a robbery as a factor to justify imposition of death penalty. West's F.S.A. §§ 812.012(3)(c), 812.014(1)(a), 812.13(1).

6. Robbery ⇐6, 7

The force, violence, assault or putting in fear required for a robbery must be contemporaneous or precedent to the taking. West's F.S.A. §§ 812.012(2)(c), 812.014(1)(a), 812.13(1).

7. Homicide ⇐354

A jury's recommendation of life is entitled to great weight and should be followed unless the facts justifying a death sentence are so clear and convincing that virtually no reasonable person could differ.

8. Homicide ⇐354

Jury's recommendation of life coupled with absence of particular aggravating factor that murder was committed during course of a robbery did not destroy trial court's statutory authority to independently weigh evidence in aggravation and mitigation and impose sentence of death after overriding jury's recommendation. West's F.S.A. §§ 812.012(2)(c), 812.014(1)(a), 812.13(1).

9. Criminal Law ⇐1208.1(5)

Mitigating circumstances in context of death penalty must, in some way, ameliorate the enormity of the defendant's guilt; age would not, therefore, be a mitigating circumstance unless it was relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them.

10. Criminal Law ⇐1208.1(5)

One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, 25 years in future upon becoming eligible for parole if given life, he will no longer be young.

11. Homicide ⇐354

Jury recommendations of life which could have been based, to some degree, on the treatment accorded one equally culpable of the murder should be upheld only in those cases where the jurors have had before them, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself.

12. Homicide ⇐354

Act of trial court in overriding jury's recommendation of death in favor of imposing death sentence after weighing evidence in aggravation and mitigation was not subject to being overturned on ground that jury's recommendation of life could have been reasonably based on disparate treatment of defendant's companion who turned State's evidence where record was devoid of any evidence which would have shown that the companion was a principal in the first degree.

Michael E. Allen, Public Defender and Steven L. Bolotin, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen. and Lawrence A. Kaden, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This appeal from a conviction of first-degree murder and sentence of death is before the Court pursuant to article V, section 3(b)(1), Florida Constitution. We affirm the conviction and the sentence.

William Eutzy and his sister-in-law, Laura Eutzy, were stopped in the Pensacola airport by a security guard. Appellant identified himself as Raymond Sanders, but Laura Eutzy gave her correct name. The couple was later seen getting into a taxicab driven by the victim, Herman Hughley.

A dispatcher for the cab company for which Hughley drove testified that Hughley reported picking up a fare at the airport with a destination in Pensacola Beach. Forty-five minutes later, Hughley reported that the destination had been changed to Fort Walton; ten or twenty minutes later he notified the dispatcher that they were going to Panama City. Three-and-a-half hours after the last report, Hughley notified the dispatcher of his return. When the dispatcher asked him to repeat his message she got no response. Repeated at-

equal culpability for the murder

trial court in overriding jury's ...mmendation of death in favor of imprisonment after weighing evidence ...on and mitigation was not subject to ... overturned on ground that recommendation of life could have ...ably based on disparate treatment ...fendant's companion who turned ...ence where record was devoid ...ence which would have shown ...panion was a principal in the

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...ley and his sister-in-law, Lau... were stopped in the Pensacola ... security guard. Appellant ...self as Raymond Sanders, but gave her correct name. The ...ter were getting into a taxicab ...e return, Herman Hughley ...er for the cab company for ...y drove testified that Hugh... picking up a fare at the airport ...ation in Pensacola Beach. ...inutes later, Hughley reported ...ination had been changed to ...ten or twenty minutes later ...e dispatcher that they were ...rama City. Three-and-a-half ...he last report, Hughley noti...ncher of his return. When ...asked him to repeat his mes... no response. Repeated at...

...tempts to reach Hughley were unsuccessful.

Hughley's body was discovered in the front seat of his cab by a driver for the same cab company, Mary Beasley. She had seen Hughley with the Eutzy couple at the airport the evening before. Her curiosity was aroused when she drove past Hughley's cab, apparently deserted, on the edge of the Pensacola Junior College campus. Other witnesses were able to testify it had been there since approximately the time of Hughley's last contact with his dispatcher.

William and Laura Eutzy were picked up while trying to hitchhike out of town the day after Hughley's body was discovered. They had been spotted by Jackie Hunsel who was at that time on her way to the police department to make a statement in the Hughley case. She had seen Hughley and appellant at the spot where Hughley was later discovered dead at about the time Hughley radioed in his last report.

Laura Eutzy had a pistol, later proven to be the murder weapon, in her purse at the time of her arrest. She testified before the grand jury and at Eutzy's trial that she had ridden in the back seat of the cab, sleeping off and on. Eutzy had sat in the front with Hughley. To the best of her knowledge, Eutzy had had only five dollars when they hired the cab; she had had no money. She did not know how they were going to pay the cab fare. Appellant said he would take care of it. When they returned to Pensacola, Eutzy had the cab driver drop Laura off at a Holiday Inn. He then rode off with Hughley. When appellant returned, Laura asked him if he had taken care of the fare. He answered in the negative and he told Laura he had hit the driver on the head with the gun but had not hurt him. Laura testified that she had not been aware that he had taken the gun until he returned it to her at that time. On the morning they were arrested, Laura read a story about Hughley's murder in the local newspaper and realized for the first time what had happened, according to her testimony.

Eutzy was tried for first-degree murder. The jury found him guilty of first-degree premeditated murder, using a special verdict form. At the guilt phase, evidence was presented that Eutzy had a prior conviction for robbery. Eutzy presented no evidence of mitigating circumstances. The jury recommended a life sentence but the judge declined to follow that recommendation. Finding three aggravating factors—conviction of a prior violent felony, murder committed during a robbery, murder was cold, calculated and premeditated—and no mitigating circumstances, the trial judge sentenced Eutzy to death.

Appellant raises no allegation of error concerning the guilt phase of the trial. We have reviewed the record independently and find no reason to disturb the jury's verdict.

[1] Appellant raises five issues challenging the imposition of the death penalty. Three of these merit little discussion. Appellant argues that the statutory authority granted a trial judge to override a jury's recommendation of life is unconstitutional as applied. This issue was not timely raised before the trial court and thus was not preserved for appeal.

[2] Appellant contends that the jury instructions given in the penalty phase were constitutionally inadequate. Without reaching the merits of the instructions themselves, we note that appellant received a jury recommendation of life imprisonment, the more lenient of the two options before the jury. Appellant is unable to demonstrate any harm arising from the allegedly erroneous instructions.

[3, 4] Appellant disputes the finding that the murder was committed in a cold, calculated and premeditated manner. However, the evidence is clear that Eutzy procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of struggle. It is axiomatic that every aggravating factor must be proved beyond a reasonable doubt. *Williams v. State*, 386 So.2d 538 (Fla.1980). That does not, however, pre-

scribe the use of circumstantial evidence to meet this burden of proof, so long as that circumstantial evidence is inconsistent with any reasonable hypothesis which negates the aggravating factor. *Compare, McArthur v. State*, 351 So.2d 972 (Fla.1977). The jury convicted Entry of first-degree premeditated murder, and Entry raises no objection to the sufficiency of the evidence, albeit circumstantial, to support that verdict. Accepting the evidence of premeditation, we can find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor. *See, e.g., Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982).

[5, 6] Appellant challenges the finding that the murder occurred during the commission of a robbery. We agree that this finding cannot be supported by the record. The state failed to present any evidence that the victim had anything of value with him before the murder or that no cash or valuables were on the victim's body when he was found. The prosecutor argued to the jury that cab fare was "due and owing" the victim and that a finding of robbery could be based on that circumstance alone. We do not find this to satisfy the elements of the robbery statute. Section 812.13(1), Florida Statutes provides: "'Robbery' means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault or putting in fear." The force, violence, assault or putting in fear must be contemporaneous or precedent to the taking. *McCloud v. State*, 335 So.2d 257 (Fla.1976); *Montesbro v. State*, 84 Fla. 82, 93 So. 127 (1922).

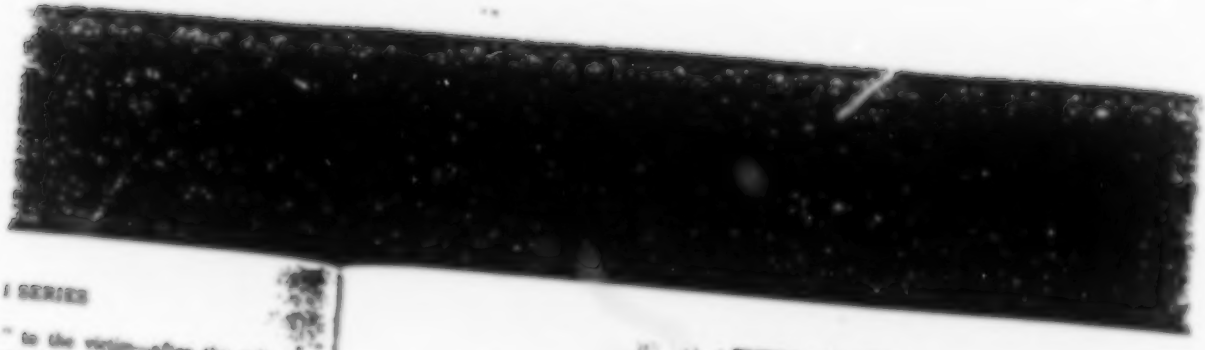
Assuming, for the moment, that no payment was made, there is nothing in the record to show that the cab ride[1] was "taken" by precedent or contemporaneous force, violence, assault or putting in fear. The murder occurred, in the prosecutor's own words, when the payment was "due and owing" to the victim—after the cab ride had been taken.

As important, however, is the utter void in the record that payment was not made or that anyrobbery occurred. As noted above, no evidence was submitted that the victim was in custody of cash or other property before he picked up the Entry people. Neither was evidence presented that no cash or property was found on or near the victim's body. Any inference that taking occurred could only be based on Laura's testimony that, to the best of her knowledge, appellant had only five dollars in his possession during these events. This evidence is counterbalanced by testimony from cab company employees that it was standard practice to demand payment in advance for any trip beyond the city limits. In the absence of any material evidence in the record which would conceivably support a finding that a robbery occurred, we must disallow this aggravating factor. We note in passing, however, that the evidence in the record was sufficient to support a finding that the murder was committed for pecuniary gain. Because the trial court failed to find this aggravating factor, we must ignore it in our review of the propriety of the jury override.

[7] Finally, appellant argues that the jury override violates the *Tedder* standard. This Court has consistently held that a jury's recommendation of life is entitled to great weight and should be followed unless the facts justifying a death sentence are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975). As well as containing two of the aggravating factors, as discussed above, appellant posits three reasons which he claims show the impropriety of the jury override.

[8] First, appellant notes that in the vast majority of all cases in which this Court has affirmed the imposition of the death sentence in spite of a jury recommendation of life, there has been a finding that

1. "Property which is subject to larceny" includes "services" according to sections 812.012(3)(c) and 812.014(1)(a), Florida Statutes. A cab ride, however provided, is a service.



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there has been a finding that

Stat. Florida Statutes. A cab ride.
case, or a service.

the murder was especially heinous, atrocious and cruel. While appellant's statistical compilation and case analysis is interesting and informative, we cannot agree that it is binding precedent for the proposition that a *jury* recommendation of life coupled with the absence of that particular aggravating factor destroys the trial judge's statutory authority to independently weigh the evidence in aggravation and mitigation and to impose sentence. Though always entitled to great weight, the jury's recommendation is only advisory. Under no combination of circumstances can that recommendation usurp the judge's role by limiting his discretion.

[9, 10] Appellant further argues that the jury could have found a mitigating circumstance in Eutzy's age. He was forty-three at the time of his conviction and, if sentenced to life imprisonment, would be sixty-eight before he became eligible for parole. Appellant argues that it was reasonable for the jury to consider in mitigation the probability that the defendant would no longer be a threat to society when he received it. In passing, we question the reasonableness of the conclusion that a previously violent sixty-eight-year-old who has spent twenty-five years in prison is, by virtue of age alone, rendered harmless to society. However, the crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. *See, Barclay* v. *State*, 343 So.2d 1266 (Fla.1977), *cert. denied*, 439 U.S. 897, 99 S.Ct. 260, 58 L.Ed.2d 237 (1978). One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young.

Of more consequence is the contention that the jury may have been swayed by the state's treatment of Laura. Originally charged with first-degree murder as a co-defendant,[3] Laura testified at trial that she was facing, at worst, five years' imprisonment for possession of a concealed weapon. At least, she would serve five years' probation.

[11] This Court has upheld the reasonableness of jury recommendations of life which could have been based, to some degree, on the treatment accorded one equally culpable of the murder. *McCampbell* v. *State*, 421 So.2d 1072 (Fla.1982). In such cases, we have reversed the judge's decision to override the recommendation when the accomplice was a principal in the first degree; *Harvey* v. *State*, 439 So.2d 1372 (Fla.1983); *McCampbell* v. *State*; when the accomplice was the actual triggerman; *Barfield* v. *State*, 402 So.2d 377 (Fla.1981); *Slater* v. *State*, 316 So.2d 539 (Fla.1975); when the evidence was equivocal as to whether defendant or the accomplice committed the actual murder; *Smith* v. *State*, 453 So.2d 933 (Fla.1981); *Malloy* v. *State*, 382 So.2d 1190 (Fla.1979); *Halliwell* v. *State*, 323 So.2d 557 (Fla.1975); or when the accomplice was the controlling force instigating the murder; *Stokes* v. *State*, 403 So.2d 377 (Fla.1981); *Neary* v. *State*, 384 So.2d 881 (Fla.1980). In every case, the jury has had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself. That is not the case before us.

[12] Had it disbelieved Laura's testimony entirely, the jury could have inferred from the facts before it that Laura knew the defendant had taken the gun from her purse. This does not suffice to make her a principal in the first degree, equally as culpable of the homicide as the defendant.

3. Laura filed a traverse to the indictment, which the state failed to answer. The state dropped the murder charge and filed an information on the concealed weapon charge. An assessment to

ter, the record shows no facts upon which Laura could have been tried for murder, unless William confined against her.

She was not at the scene of the crime, there was testimony in evidence that she was seen at the Holiday Inn at the approximate time the murder occurred and that she was not at the scene of the crime when Jackie Hamel saw Estey and the victim there. Nor is there anything in the record which would support a reasonable inference that she was constructively present. There is no evidence which would show that she aided, abetted, counseled, hired or otherwise procured the offense. For a jury recommendation of life to be reasonable, based on lenient treatment accorded an accomplice, the jury must have been presented with evidence tending to prove the accomplice's equal culpability. Otherwise, the state, which often must rely on testimony of a defendant's unsavory companions in presenting evidence of a crime, would bear the burden of rehabilitating those witnesses and defending the legal propriety of treatment the jury might perceive as too lenient. The jury may reasonably compare the treatment of those equally guilty of a crime; it may not compare treatment of those guilty of a different, lesser crime in weighing the propriety of the death penalty. Because the record is devoid of any evidence which would show that Laura was a principal in the first degree in the murder, we must reject the argument that the jury's recommendation of life could reasonably have been based on the disparate treatment of Laura and William.

No evidence of mitigating circumstances was presented for the jury to consider. We have rejected as unreasonable those considerations which may have influenced the jury's recommendation of life. Faced with two validly applied aggravating factors and no valid mitigating circumstances, either statutory or non-statutory, we find no reason to disturb the sentence imposed by the trial court. We find from a comparison of past first-degree murder cases that the sentence is consistent with that imposed for similar homicides. The conviction and sentence are accordingly affirmed.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., concur.

McDONALD, J., concurs in the conviction, but dissents from the sentence.

Eugene HALL, Petitioner,

v.

BILLY JACK'S, INC., Respondent.

No. 63147.

Supreme Court of Florida.

Oct. 11, 1984.

Rehearing Denied Dec. 10, 1984.

Tavern patron brought negligence action against another patron and tavern to recover for injuries sustained in assault by other patron. The Circuit Court, Hillsborough County, Guy W. Spicola, J., entered judgment on a jury verdict in favor of tavern patron and awarded $240,000 against other patron and tavern jointly. On appeal, 428 So.2d 268, the District Court of Appeal affirmed as to other patron but reversed as to tavern on ground that tavern was not shown to have breached its duty to tavern patron in that evidence did not support a finding that tavern owner knew or should have known that other patron would attack without provocation. On application for review, the Supreme Court, Ehrlich, J., held that the District Court of Appeal's reliance upon a theory of liability more narrow than that which the Supreme Court had subsequently enunciated when it released tavern from liability to tavern patron for injuries received in assault by another tavern patron required remand for reconsideration.

Remanded.

IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

v. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

MOTION FOR REHEARING

Appellant, WILLIAM EUTZY, pursuant to Fla.R.App.P. 9.330(a), moves this Court for rehearing in the above-styled case, and as grounds therefor states:

1. This Court, in approving the trial court's finding of the "cold, calculated, and premeditated" aggravating circumstance, said

> . . . the evidence is clear that Eutzy procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of struggle. It is axiomatic that every aggravating factor must be proved beyond a reasonable doubt. Williams v. State, 386 So.2d 538 (Fla. 1980). This does not, however, proscribe the use of circumstantial evidence to meet this burden of proof, so long as that circumstantial evidence is inconsistent with any reasonable hypothesis which negates the aggravating factor. Compare, McArthur v. State, 351 So.2d 972 (Fla. 1977). The jury convicted Eutzy of first-degree premeditated murder, and Eutzy raises no objection to the sufficiency of the evidence, albeit circumstantial, to support that verdict. Accepting the evidence of premeditation, we can find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor. See, e.g. Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982).

Appellant submits that, in reaching these conclusions, this Court may have overlooked or misapprehended several points of law or fact.

2. First, appellant submits that this Court failed to apply the Tedder[1] standard, because it determined the

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[1] Tedder v. State, 322 So.2d 908 (Fla. 1975).

applicability of the "cold, calculated, and premeditated" aggravating circumstance solely in terms of whether the circumstantial evidence was legally sufficient to sustain the trial court's finding of this circumstance, just as if this were a death recommendation case. Since this case, in fact, involved a trial court override of a jury life recommendation, the "cold, calculated, and premeditated" finding could be upheld, under proper application of the Tedder standard, only if the evidence of the existence of this circumstance was so overwhelming that the jury was required to find it, or else be labeled "unreasonable" if they did not find it. In the instant case, appellant submits that, while admittedly there was circumstantial evidence which would support a finding of simple premeditation for a first degree murder conviction, there was no evidence, circumstantial or otherwise, to prove the "heightened" level of premeditation or calculation needed to establish the aggravating circumstance. The state's rather remarkable theory of what transpired - that appellant formulated a plan as early as Saturday afternoon in the airport to secretly remove his sister-in-law's gun from her purse, take a pointless four hour cab ride to Panama City and back, and shoot the cab driver in lieu of paying the fare - would indeed amount to a cold, calculated, and premeditated homicide if this theory were based on evidence rather than speculation, but it was not. Appellant did not testify. Herman Hughley, the victim, could not testify. Laura Eutzy claimed not to be present when the murder occurred and claimed to be asleep during most of the four hour cab ride. The state produced no evidence that any money was taken from Hughley, no evidence as to whether he had any cash prior to picking up appellant and Laura Eutzy, no evidence as to whether he habitually carried any cash, and no evidence as to whether there was any money on his person when he was found dead in the cab. Laura Eutzy "believed" that appellant had only five dollars, but she did not know for a fact how much money he had, or whether he had any. The state produced no evidence

as to whether appellant had any money when he was arrested. There was evidence that the round-trip to Panama City would probably cost about $135.00, and that cab drivers are supposed to collect the money up front, before leaving town on such a long trip. There was no evidence of any discussion between Hughley and appellant about the fare. As this Court recognized, there is "an utter void in the record that payment was not made or that any robbery occurred" (slip opinion, p.5).[2] This evidentiary void precludes a finding that the "heightened" degree of premeditation required to support a finding of the "cold, calculated, and premeditated" aggravating circumstance was proven beyond a reasonable doubt. See State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) (aggravating circumstances must be proven beyond a reasonable doubt). See also Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970) (recognizing constitutional basis of reasonable doubt standard).

3. In its opinion, this Court appears to have equated circumstantial evidence of premeditation (for a conviction) with circumstantial evidence of heightened premeditation (for the aggravating circumstance), and shifted the burden of proof to appellant to disprove the heightened level of calculation or planning in order to avoid a finding of the aggravating circumstance:

> The jury convicted Eutzy of first-degree premeditated murder, and Eutzy raises no objection to the sufficiency of the evidence.

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[2] Laura Eutzy did testify that appellant had said he would take care of the fare; and that when he returned to the hotel she asked him if he had taken care of it, and he replied that he had hit the cab driver and knocked him out. But, as appellant contended in his initial brief (at p.29-30), and as the Court appears to have recognized (slip opinion, p.7) there was a strong likelihood that the jury had doubts about the veracity of Laura's testimony. Such doubts would not be inconsistent with the jury's guilt phase verdict finding appellant guilty of first-degree premeditated murder since they could have disbelieved Laura entirely and still convicted appellant based on the testimony of Jackie Hummel and the firearms examiner. The circumstances of the premeditated murder, however, were not established by the skeletal evidence presented by the state, and whatever minimal evidence there was as to what actually occurred was totally dependent on the testimony of Laura Eutzy.

albeit circumstantial, to support that verdict. Accepting the evidence of premeditation, we can find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor.

(Slip opinion, p.4)

Appellant submits that shifting the burden of proof to the accused to disprove the heightened degree of premeditation, where the circumstantial evidence is sufficient to establish premeditation but insufficient to prove one way or the other whether the degree of premeditation was "heightened" or "simple", violates the due process clause of the Fourteenth Amendment to the United States Constitution. See Mullaney v. Wilbur, 421 U.S. 684 (1975).

4. Even assuming arguendo that the "cold, calculated, and premeditated" aggravating circumstance could be upheld, and even assuming arguendo that proper application of the Tedder standard did not require that appellant's sentence be reduced to life imprisonment in accordance with the jury's recommendation, this Court's affirmance of appellant's death sentence still cannot be reconciled with its prior decisions. This Court invalidated the trial court's finding that the homicide occurred in the course of a robbery, but appears to have concluded that with two remaining aggravating circumstances and (in the opinion of the trial court and this Court) no mitigating circumstances, death was presumed to be the proper sentence. See State v. Dixon, supra, at 9. However, as recognized in Williams v. State, 386 So.2d 538, 543 (Fla. 1980), a jury's recommendation of life imprisonment militates against such a presumption. See e.g. Lewis v. State, 398 So.2d 432 (Fla. 1981) (where aggravating circumstances were rejected by this Court and where no mitigating circumstances were found, this Court remanded the case "for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury"). This Court cannot simply assume that the trial court's erroneous finding that the homicide was committed in the course of a robbery,

which was strenously argued below, did not affect his decision to override the jury's recommendation.

WHEREFORE, appellant respectfully requests that this motion for rehearing be granted.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Lawrence Kaden, The Capitol, Tallahassee, Florida; and by mail to Mr. William Eutzy, #090480, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 5 day of October, 1984.

STEVEN L. BOLOTIN
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

MONDAY, DECEMBER 3, 1984

WILLIAM EUTZY,	**	
Appellant,	**	CASE NO. 64,212
vs.	**	Circuit Court Case No. 83-1105-F (Escambia)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, ALDERMAN, EHRLICH and SHAW, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

DEC 4 1984
PUBLIC DEFENDER
2nd JUDICIAL CIR.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

cc: Hon. Ernie Lee Magaha, Clerk
Hon. William S. Rowley, Judge

Steven L. Bolotin, Esquire
Lawrence A. Kaden, Esquire

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92. Amended by Laws 1983, c. 83-87, 12, 1983.

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References
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(b) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding a sentence of imprisonment:

1. The defendant's criminal conduct neither caused nor threatened serious harm.

2. The defendant did not know and had no reason to know that his criminal conduct would cause or threaten serious harm.

3. The defendant acted under a strong provocation.

4. There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.

5. The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that the victim sustained.

6. The defendant has no history of prior delinquency or criminal activity or had led a law-abiding life for a substantial period of time before the commission of the present crime.

7. The defendant's criminal conduct was the result of circumstances unlikely to recur.

8. The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

9. The defendant is particularly likely to respond affirmatively to noncustodial treatment.

(2)(a) A court shall sentence a defendant to pay a fine unless it finds that the defendant is unable or will be unable to pay the fine and the imposition of a fine will not prevent the defendant from being rehabilitated or from making restitution to the victim of his crime.

(b) A court shall sentence a defendant to pay a fine whenever the imposition of a fine is sufficient to punish the defendant and protect the public.

(c) A court shall sentence a defendant to pay a fine in addition to imprisonment or probation if, in the opinion of the court, the defendant has derived a pecuniary gain from his crime or the fine is specially adapted to deterrence of the particular crime or to the punishment and rehabilitation of the offender.

Laws 1988, c. 88-131, § 7, eff. Oct. 1, 1988.

Library References
Criminal Law ⇐1208(1).
C.J.S. Criminal Law §§ 1980, 1986.

921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the

Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5).

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **Review of judgment and sentence.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **Mitigating circumstances.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

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(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972; Laws 1974, c. 74-379, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 260, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 3, 1979; Laws 1980, c. 80-216, § 177, eff. Aug. 15, 1980.

Laws 1972, c. 72-724, § 9, substantially reworded this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (3).

Laws 1977, c. 77-104, a reviser's bill corrected errors and deleted obsolete or expired provisions. See Reviser's Note—1977.

Laws 1977, c. 77-174, a reviser's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

Laws 1979, c. 79-353, substituted in the fifth sentence of subsec. (1) "to the nature of the crime and the character of the defendant" for "to sentence", deleted in subsecs. (2)(b) and (3)(b) "as enumerated in subsection (5)", and added subsec. (5)(i).

Laws 1980, c. 80-216, was a reviser's corrective bill amending subsec. (5)(d). See Reviser's Note—1980.

Reviser's Note—1977:

Conforms internal references to editorial reassignment of subsections created by s. 9, ch. 72-724, Laws of Florida.

Reviser's Note—1980:

Amended to conform to ch. 74-121, Laws of Florida, which replaced the crime of rape formerly proscribed in ch. 794 with the crime known as "sexual battery." See s. 794.011.

Cross References

Sentencing hearing for capital cases, see Criminal Procedure Rule 3.780.

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United States Supreme Court

Aggravating circumstances, necessity of jury findings, see Presnell v. Georgia, 1978, 98 S.Ct. 2610, 439 U.S. 14, 58 L.Ed.2d 207.

Capital sentencing statute, separate proceeding to establish sentence as constituting double jeopardy, see Bullington v. Missouri, 1981, 101 S.Ct. 1852, 451 U.S. 430, 68 L.Ed.2d 270.

Commutation of death sentence to long term sentences, see Rose v. Hodges, 1975, 96 S.Ct. 175, 423 U.S. 19, 46 L.Ed.2d 162.

Death penalty, application for stay of execution by mother on behalf of incompetent son, see Evans v. Bennett, 1979, 99 S.Ct. 1461, 440 U.S. 1301, 59 L.Ed.2d 794.

Death penalty, disclosure of presentence information, see Gardner v. Florida, 1977, 97 S.Ct. 1197, 430 U.S. 349, 51 L.Ed.2d 393.

Death penalty, see Dobbert v. Florida, 1977, 97 S.Ct. 2290, 432 U.S. 282, 53 L.Ed.2d 344; Roberts v. Louisiana, 1977, 97 S.Ct. 1993, 431 U.S. 633, 52 L.Ed.2d 637.

Death penalty, exclusion of veniremen, see Davis v. Georgia, 1976, 97 S.Ct. 399, 429 U.S. 122, 50 L.Ed.2d 339.

Death penalty, mitigating factors, see Lockett v. Ohio, 1978, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed.2d 973.

however you want, but don't do it based on Laura Autry's testimony. Thank you.

THE COURT: All right, I'm going to instruct the Jury. If anyone wants to go, you'd better go now because I don't want anyone moving when I'm instructing the Jury, not on this type of case, anyhow.

Ladies and gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of First Degree Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist, to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard and that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to the following that are established by the evidence. The Defendant has previously been convicted of another

offense or a felony involving the use or threat of violence to some other person. The crime of robbery is a felony involving the use or threat of violence to another person. The crime for which the Defendant is to be sentenced was committed while he was engaged in the crime of robbery. And the crime for which the Defendant is to be sentenced was committed in the cold, calculated and premeditated manner, without any pretense or moral or legal justification.

Each aggravating circumstance must be established beyond a reasonable doubt before it can be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. Mitigating circumstances need not be proved beyond a reasonable doubt by the Defendant if you are reasonably convinced that mitigating circumstances exist; you may consider it as established.

The sentence you recommend to the Court must be based upon the facts, as you find them, from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and

your advisory sentence must be based on these considerations. In these proceedings it is not necessary that the advisory sentence of the Jury be unanimous. Your decision may be made by a majority of the Jury.

The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment, in this case, can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment in reaching your advisory sentence. If a majority of the Jury determines that the Defendant should be sentenced to death, your advisory sentence will be a majority of the Jury by a vote of whatever number advise and recommend to the Court that it imposed the death penalty upon the Defendant. On the other hand, if by six or more votes the Jury determines that the Defendant should not be sentenced to death, your advisory sentence will be... the Jury advises and recommends to the Court that it imposes a sentence of life imprisonment upon the Defendant without possibility

of parole for twenty-five years.

You will now be able to retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

As you will note, I have used mitigating circumstances and have eluded there have been no mitigating circumstances in these proceedings. I want to make one word of caution. You are to take into consideration the entire proceedings into your deliberation, and in those deliberations, if you find any mitigating circumstances you may consider them also. That's why I used it in this phase of the proceedings.

(WHEREUPON THE JURY RETIRED TO CONSIDER THE CASE.)

(UPON RESUMING.)

THE COURT: You can be seated. Thank you.

THE SECURITY OFFICER: The Jury is in the box, Your Honor.

THE COURT: Members of the Jury, have you arrived at a verdict in the penalty phase?

THE FOREMAN: Yes, Your Honor.

THE COURT: Give it to the security, please. Harken to your verdict.

FINDINGS OF THE COURT IN THE PENALTY PHASE

The Court finds based upon the evidence and the certified copy of the record of conviction of the defendant for robbery and the defendant's statements to the corrections or booking officer, that he had been convicted of the crime of robbery on a prior occasion, the Court finds the evidence substantiates the defendant has been convicted in a prior offense involving use or threat of violence to a person, to-wit: robbery, which is a felony.

That based upon the evidence in this case and the circumstances the Court finds the defendant was at the time of the homicide, even though the jury did not so find, was committed while in the course of a robbery, the evidence reflecting at the time, the defendant and his associate or friend had between them only $5.00, that they took the cab from the municipal airport for a trip to Pensacola Beach Fort Walton and possibility Panama City. The testimony being that the cost of a trip one way to Panama City could be $90.00 though it could be negotiable to a degree and the defendant's actions in having the cab driver return his associate or friend to the Universit Mall Holiday Inn and going away with the driver and having at some time taken the death weapon, the 25 caliber pistol from the handbag of the associate or friend was at least an intent at that time of formulating the idea of robbery and appears to be the motivating factor or course in this offense and in fact a robbery was committed.

The crime for which the defendant should be sentenced was committ in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Appendix P

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The circumstances in this case which bear out the defendant at some time prior to the instant took from his associate or friend a 25 caliber automatic pistol which was the death weapon and left his friend or associate at the Holiday Inn and University Mall and proceeded with the victim to the murder spot which was some few miles from the Holiday Inn, that the victim was seen by one of the witnesses, a female, the Court cannot remember distinctly her name, seems like Hammel, which based on the evidence was a short time before the victim was killed.

The evidence would show that the way in which the victim was killed would indicate no altercation or struggle and the ballistics expert having testified that based on the powder residue on the victi[illegible] ca[illegible] and band that the death missile was fired from the weapon just a few inches from the point of entry and the pathologist's report was the victim was shot in the back of the head on the right side.

The court's findings bear out a crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditat manner without any pretense of moral or legal justification.

The court finds that there are 3 aggravating circumstances in this case while there were no mitigating circumstances at the penalty phase nor any evidence or circumstances during the trial of the substantive phase of this case of mitigating circumstances.

IN THE SUPREME COURT OF FLORIDA

WILLIAM GUTZY,

Appellant,

vs. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,	:	
Appellant,	:	
vs.	:	CASE NO. 64,812
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, WILLIAM E f, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

William Eutzy and Laura Denise Eutzy were charged by indictment returned March 15, 1983 with the first degree murder of Herman Hughley (R.344). Laura Denise Eutzy was charged in a second count with carrying a concealed firearm (R.344). Following jury selection on July 5, 1983 (R.3-91), William Eutzy's case proceeded to trial on July 6-7, 1983, before Circuit Judge William S. Bowley and a jury. The jury returned a verdict finding William Eutzy guilty as charged of first degree murder with premeditation (R.304-05,375). After the penalty phase of the trial, the jury recommended that Eutzy by sentenced to life imprisonment without possibility of parole for 25 years (R.335,378).

The trial court declined to follow the jury's recommendation and imposed the death penalty (R.341,376-77,382). Notice of appeal was filed on July 22, 1983 (R.386). On September 6, 1983, the First District Court of Appeal (in which the appeal had been mistakenly filed) transferred the appeal to the Supreme Court of Florida.

III STATEMENT OF THE FACTS

The following is a summary of the evidence presented at trial:

Paul Ferguson, a police officer employed at the regional airport in Pensacola, observed a white male and a white female walking around inside the terminal at about 12:30 a.m. on February 26, 1983 (R.105-06). The man had glasses, a mustache, and a stubble of beard, was wearing a brown cowboy hat, and was carrying a brown briefcase (R.111). Ferguson approached them to ascertain whether they were waiting for a flight or a cab, and the man said he was going back to Missouri (R.106). Ferguson asked for identification, and the man showed him a government vehicle card in the name of Raymond Sanders (R.106-07). The woman showed him a Louisiana driver's license (R.107). Ferguson wrote down the information on a piece of paper (R.107). He then went back to making his rounds, during which time he occasionally saw the man and woman (R.109). When he got off work at 8:00 a.m., Ferguson did not see them, and they did not come through the screening area, which they would have done to board a flight (R.109). He did not see them again that day (R.110). [Ferguson identified appellant, William Eutzy, as the man he approached at the airport (R.108)].

The following night, at about 11:30 p.m., Ferguson was driving back to work and he passed the intersection of College Boulevard and Tippen Avenue, where he saw a Dodge Aspen or Volare station wagon (R.110-11). The vehicle

was a West Hill cab (R.110). Ferguson later passed the same cab at that location four or five more times; he assumed it was broken down (R.111). The next day, after the body was discovered, there were police cars around the cab (R.111-12).

On cross-examination, Ferguson testified that the woman at the airport had a blue handbag or purse, which she went into to get her identification (R.115).

Mary Louise Kirkland, a cab driver with West Hill Taxi Company, was working the airport on Saturday, February 26, 1983 (R.116-17). On Friday night, another cab driver had pointed out to her a tall, slender man wearing a hat and a brown plaid shirt-jacket (R.117). She saw him again on Saturday afternoon around 6:30 or 7:00 p.m. in the company of a fat, long-haired woman (R.118). They were getting into the cab in front of Ms. Kirkland's cab, which was driven by Herman Hughley (R.118). Ms. Kirkland identified appellant as the man she saw getting into the cab (R.119).

Rosemary Kirkland, a dispatcher with West Hill Taxi Company, received a dispatch from Herman Hughley at about 6:30 p.m. on February 26, 1983 that he had picked up a fare at the airport and they were going to Pensacola Beach (R.121). At about 7:15 p.m. Hughley informed Ms. Kirkland that they were going to Fort Walton, and ten or twenty minutes later he reported back that they had changed their minds and were going to Panama City (R.121). At about 11:00 p.m., Hughley reported that he had just gotten back (R.122). Ms. Kirkland asked him to repeat what he had said, but she got no response (R.122). She kept calling him by his number, and continued to receive no response (R.122).

Soliver Ernest Dolby, a security supervisor with Burns Security, was supervising the main campus of Pensacola Junior College (R.124). At around

11:00 p.m. on February 26, 1983, he was making rounds in the vicinity of College and Tippen (R.125). He did not at that time see a West Hill taxicab parked at that intersection (R.125). If one had been parked there, he did not think he would have noticed it, because there were always cars parked around the handball courts (R.125-26). At about 4:20 a.m., Dolby saw flashing police car lights, and went over and saw a cab (R.125).

Roy Duggan and his wife were returning from a Boy Scout banquet, when they observed a white cab parallel parked on the street near the intersection of College and Tippen (R.128). This was unusual, since cars usually park there at a 90 degree angle, there were no lights on the tennis or racquetball courts, and there was no one around the cab (R.128). Duggan discussed this with his wife (R.128).

Mary Beasley, a cab driver with West Hill, saw Herman Hughley at the airport between 6:00 and 6:30 p.m. on February 26, 1983 (R.130-31). She did not see anyone get into Hughley's cab, since he was behind her (R.131). The following day, Ms. Beasley had to be back at the airport at 4:00 a.m., and on her way there she saw Hughley's cab parked alongside Tippen Avenue (R.131). She backed up and looked in the window (R.131). She could see that somebody was lying across the seat (R.131). She opened the door, and saw that it was Herman Hughley (R.132). Ms. Beasley then called the dispatcher and told them to send somebody over, while she tried to determine what was wrong with Hughley (R.132).

Ms. Beasley further testified that it was ninety-eight miles from Pensacola to Panama City (R.134). As a taxi driver, if you were to drive somebody to Panama City and back, you would collect your money before you leave town (R.134). Ms. Beasley testified that the fare would be at least ninety dollars to Panama City, and the driver could take half fare, an additional

forty-five dollars, coming back, for a total of one hundred thirty-five dollars round trip (R.134-35).

On cross-examination, Ms. Beasley testified that you don't run the meter out of county. She reiterated that if a couple wanted to go to Pensacola Beach, then changed their minds and wanted to go to Fort Walton, and then decided they wanted to go to Panama City, "I would definitely collect the money first, or I don't go" (R.136). Ms. Beasley stated that it is about a two hour trip to Panama City, or about four hours round trip (R.136-37).

Larry Giles of the Pensacola Police Department observed a taxi parked in an unusual location near the racquetball courts at Pensacola Junior College (R.139-40). He shined his light into the vehicle and didn't see anyone (R.140). He would have stopped, but he was on his way to the scene of an accident (R.140). At the accident scene, another officer, Deputy Robinson, mentioned something about a report of an abandoned vehicle, and Giles told him about the cab near the racquetball courts (R.140). Robinson said he'd check (R.141). Giles finished his accident report and was heading toward the abandoned cab when he received a dispatch that a dead person had been found in the cab (R.141). This was confirmed by Deputy Robinson when Giles arrived there (R.141). Giles secured the crime scene, completed an initial report, and turned the investigation over to other officers (R.141-43).

Gary Maison, an investigator with the Pensacola Police Department, received a dispatch at his home on the morning of February 27, 1981 that a cab driver had been found shot to death inside his cab (R.[illegible]). Maison went to the scene, where he spoke with Officer Giles, and subsequently interviewed several cab drivers, dispatchers, and witnesses at the airport (R.147-48). On Monday morning, he interviewed an individual named Jackie Hamel at the police department (R.148). During this interview, it was brought out that the people Ms. Hamel saw at the airport, and "quite possibly" the same people that were seen with the cab driver,

were seen on Interstate 10 hitchhiking out of town (R.147). Officers Duck and Williams were sent out to the Interstate, and they returned with a man and woman identified as Ray Sanders and Laura Eutzy (R.149). [Maisen identified appellant as the person who gave the name of Ray Sanders (R.149-50)]. Maisen read them their constitutional rights, and they signed waiver forms (R.150). Appellant signed his form "Ray Sanders" (R.150). Laura Eutzy subsequently gave some statements (R.150). It had been ascertained at the Interstate that Laura Eutzy was in possession of a pistol (R.150). At the police department, she signed a consent to search her purse, and a warrant was obtained as well (R.150-51). Inside the purse was a .25 automatic pistol (R.151). Arrangements were made to send the pistol to Tallahassee for testing (R.151). Later that afternoon, David Williams of the F.D.L.E. called back and informed them that the pistol taken from Laura Eutzy's purse was positively identified as the murder weapon (R.152). Maisen and Sergeant Burns confronted Laura Eutzy with this information, at which time she gave another statement (R.152).

On cross-examination, Officer Maisen testified that when he first talked to Laura Eutzy, she said she didn't arrive in Pensacola until a time which was after the murder of Herman Hughley had occurred (R.153). When she was informed that the gun found in her purse was the murder weapon, she changed her story in some respects (R.153-54).

Jacqueline Hummel was an employee with the cleaning crew at Pensacola Airport (R.156). On February 26, 1983, between 6:30 and 7:00 p.m., a person named Mark Miller pointed out to her a man in a cowboy hat with black hair, glasses, and a mustache, and a stout lady with long black hair (R.156-57). The man was wearing jeans and a flannel shirt (R.156-57). Later that night, after she got off work at 11:00 p.m., Ms. Hummel saw Herman Hughley parked on Tippen Avenue

facing back toward College Boulevard (R.157). She thought his cab might have broken down or something, but he said no, that he was just waiting on this guy (R.157). Hughley kept looking back over the passenger's door toward a man who was leaning on the door (R.157,160-61). The man then walked over by a tree and stood there, and was still there when she left (R.157). He had a cowboy hat, glasses, and a mustache, and "from what [she] saw" he was the same person she had seen at the airport (R.158).

The following Monday morning, as Ms. Bunel was driving to the police station, she saw the same man and woman she had seen at the airport on the Interstate, standing underneath the exit for the bypass (R.158). The man was the same one she had seen at Mr. Hughley's cab (R.158-59). When she got to the police station, she made a composite of the person she saw (R.159-62). Ms. Bunel identified appellant as the man she saw at the airport, by the taxicab, and on the Interstate (R.158).

James Richbourg, a crime scene investigator with the Pensacola Police Department, was dispatched to College Boulevard and Tippen in the early morning of February 27, 1983 (R.162). He saw a Plymouth Volare station wagon taxicab at the side of the road with a man slumped over the front seat (R.163). Richbourg processed the crime scene, taking photographs and collecting evidence (R.163). He collected an expended cartridge from the left rear floorboard of the cab (R.163).

Later that morning, Richbourg was present at the autopsy of Herman Hughley, where he observed and photographed a gunshot wound to the right side of Hughley's head (R.164-65). The pathologist, Dr. Potter, removed the bullet (R.165,167-68).

Officer Richbourg further testified that the gun which was removed from Laura Bailey's purse, along with the bullet and cartridge case, were sent to

Tallahassee for testing (R.169). Seven more rounds of ammunition were removed from the weapon, and there were twelve additional rounds in Laura Eutzy's purse (R.169-70). Eleven of these rounds were wrapped in tissue paper and there was one loose round (R.170). In addition to the pistol and the live cartridges, Laura Eutzy's purse contained the following items: one brush, four ink pens, one piece of paper with writing on it, five earrings, one bottle of perfume, two lipsticks, one bottle of nail glaze, one powdered eyeshadow, one mascara, four lighters, one nail clipper, two nail files, a pair of tweezers, a bottle of skin lotion, a coupon, a key, a box of No-Doz with two tablets, a case of Demulen with eight tablets, a fuse, five barrettes, an eyeglass repair kit, a jewelry case, a pack of gum, two necklaces, a razor case and razor, a St. Christopher medal, a high school medal, two Eastern luggage tags, a travel pamphlet, two gold rings and a silver band, an address case, a calendar, an envelope containing two letters from the Division of Motor Vehicles, seven pictures, a birth certificate, a marriage certificate, a letter from Harmon and Cats (sic), a receipt, a wallet with miscellaneous papers, a driver's license in the name of John Carl Eutzy, two social security cards in the name of Laura Eutzy and one in the name of John Eutzy, another gold ring, and a pamphlet on the RG-26 automatic pistol (R.172-76). Richbourg testified that he could see the pistol in the center of the purse as he opened the purse (R.176-77). There was no problem seeing it (R.177).

Oscar Charles Meadows, a security officer with the Holiday Inn, testified that between 11:00 p.m. and midnight on February 26, 1983 he saw a person who was later identified to him as Laura Eutzy (R.179-80). The following night, Sunday, he saw a person who was identified to him as Raymond Sanders (R.180). Meadows testified that "Sanders" was appellant, William Eutzy (R.180).

On cross-examination, Meadows acknowledged that in deposition he had

stated that the first time he saw either Laura Eutzy or Raymond Sanders was at about 2:00 a.m. on Sunday morning sitting on a loveseat outside Chap's Restaurant (R.181-84). Meadows testified that he could swear to having seen them together outside of Chap's at 2:00 a.m.; he thought he also had seen Laura Eutzy alone around 11:00 p.m. but he could not swear to it (R.183-84, 188). Later on, around 3:00 a.m., Meadows asked them both why they were sitting there, and "Sanders" replied that he was waiting for relatives to pick him up in the morning (R.185).

Meadows stated that appellant, or "Sanders", was wearing jeans and a shirt; the jeans were "possibly" very tight fitting (R.185). Meadows testified that if appellant had a weapon on his person, or in a pocket or in his waistband, he [Meadows] would have seen it (R.185-86). Meadows stated that he did not see a weapon on appellant's person, or in his pockets or waistband (R.186).

On re-direct, Meadows stated that he did not have occasion to see the back of appellant's waistband (R.187).

James Duck, a Pensacola police officer, drove out to the intersection of I-10 and I-110 on February 28, 1983 to check on a person who was supposed to be hitchhiking there (R.189-90). Duck and another officer observed a white male and a white female standing on the concrete embankment under the overpass (R.190). Duck identified appellant as the male (R.190). The officers advised them that they were suspects in a crime which had occurred in the city, patted them down for weapons, and brought them to the police station for questioning (R.191). Duck asked the woman if she had any knives or guns in her purse, and she answered "yes" (R.191). She said she had a weapon in the zipper section of the purse; Dick looked inside and found a gun, which he subsequently turned over to Officer Gary Meisen (R.192). Ap-

pellant did not have a weapon on him (R.192).

Laura Denise Eutzy testified that she and her brother-in-law, William Eutzy, arrived in Pensacola on Friday night, February 25, 1983, having last been in Orlando (R.193-95). They went to the Holiday Inn at University Mall and stayed for about an hour and then walked to the airport (R.195-97). They sat around at the airport all night and all day Saturday (R.197-98). Ms. Eutzy testified that they were on their way to Missouri, where her mother lives, and had no particular purpose in coming to Pensacola (R.196).

Laura Eutzy testified that she bought a gun earlier that month in Slidell, Louisiana, because appellant had recommended that she buy one for protection (R.198). Appellant helped pick it out; he said it was a woman's gun (R.198-99). Ms. Eutzy believed that the gun was in her purse when they arrived in Pensacola (R.199).

Laura Eutzy and appellant remained at the airport until about 7:00 p.m. on Saturday, when they caught a cab in front of the airport (R.199). They were going to go to the Holiday Inn on Pensacola Beach, but then they headed to Fort Walton instead (R.200). Appellant was in the front of the cab and Ms. Eutzy was in the back (R.200). She did not know for a fact whether they ever went to Fort Walton, but she heard appellant mention Panama City (R.200-01). She was asleep in the back seat "off and on" (R.201). She believed the gun was in her possession at that time (R.201). Ms. Eutzy estimated that they were in the cab on the way to Panama City for at least two hours (R.201-02). She also did not know for a fact if they ever actually got to Panama City, but she recalled appellant saying he would like to go back to Pensacola (R.201). When they got back to Pensacola around 11:30 p.m. they went back to the Holiday Inn at University Mall (R.202-03). Appellant told Ms. Eutzy to go on inside, that he would be in in a few minutes (R.202). She went into the rest room,

and when she came back out appellant and the cab driver were gone (R.202-03).

Ms. Eutzy testified that she had no money on her and she believed that appellant had five dollars (R.203). She had no idea how they were going to pay the cab fare; appellant had said he would take care of it (R.203-04). When appellant returned to the hotel about half an hour later, she asked him if he had taken care of it (R.203-04). Appellant said "No", that he had hit the cab driver and knocked him out, but didn't hurt him (R.204). They spent Saturday night at the Holiday Inn, Sunday afternoon at the mall, Sunday night at the Holiday Inn again, and on Monday morning began hitchhiking out of town (R.204). On Monday morning, Ms. Eutzy started to read a Pensacola newspaper (R.204). Appellant tried to take it away from her, and she asked him if there was anything in it he didn't want her to read (R.205). He said "No." (R.205). She got the paper back and saw a headline about the cab driver who was killed (R.205). Appellant said he didn't want to talk about it (R.205). He said he didn't tell her because he didn't want her to worry about it, and he thought she might turn him in (R.205). Ms. Eutzy testified that she would have turned appellant in except he wouldn't let her out of his sight all day until they were picked up by the police officer (R.205-06).

Ms. Eutzy testified that she never saw appellant in possession of her pistol until he gave it back to her on Monday morning (R.206). He told her to come into the arcade in the hotel and open up her purse (R.206). He had her gun tucked into the waistband of his pants, and he put it back into her purse (R.207). Ms. Eutzy testified that she never noticed that the gun was missing, and that she never once opened her purse any time from Saturday night until Monday morning (R.207).

After appellant returned the gun, they went out on the Interstate and started hitchhiking (R.207). About an hour later, the police came and picked

them up (R.207). Ms. Eutzy identified herself as Laura Eutzy and appellant identified himself as Raymond Sanders (R.208). Appellant had previously told Ms. Eutzy that that was the name he was traveling under (R.208). When the police first questioned her, Ms. Eutzy told them her brother-in-law was named Raymond Sanders, because she was afraid of him (R.209). She acknowledged that she told the police officers stories to protect appellant, again attributing this to being scared of him (R.209-10). She later had occasion to change some of the facts she told the police officers (R.210).

Ms. Eutzy testified that she voluntarily testified before the Grand Jury as to her participation in the investigation (R.210). She testified that she did not have anything to do with the murder of Herman Hughley (R.210).

On cross-examination, Laura Eutzy stated that she testified before the Grand Jury on March 15, 1983, wherein she gave basically the same testimony as she had just given at appellant's trial (R.212). On that same date, she was indicted by the Grand Jury for first degree murder (R.212). The murder charge against her was subsequently dropped (apparently because the state did not traverse her motion to dismiss)(R.212-13). Ms. Eutzy was testifying with the understanding that the state would recommend probation on the concealed weapon charge if she did so (R.213).

Ms. Eutzy testified that she believed appellant had five dollars, but did not know for a fact how much money he had, or whether he had any (R.219).

Laura Eutzy further stated that when she arrived in Pensacola, she believed the gun was in her purse (R.220). She gave the following testimony:

> MR. LANG: When was the last time you looked in your purse?
>
> LAURA EUTZY: Before we ever got to Pensacola.
>
> MR. LANG: When was the first time, a week before you got to Pensacola?
>
> LAURA EUTZY: I really couldn't say.

MR. LANG: Now, you have got quite a number of things in your purse, cosmetics, lipstick and all that sort of stuff. You are saying you never went in your purse from before you got to Pensacola until the time you left and got arrested.

LAURA EUTZY: No.

MR. LANG: When was the last time, if you can recall, when you went into your purse? Do you go into your purse when you go into the bathroom?

LAURA EUTZY: No; there is nothing in it for me to really, you know, get into my purse...

MR. LANG: In your purse you had a bottle of perfume, lipstick, nail glaze, eyeshadow, mascara, nail clippers, fingernail file, skin lotion, gun and all these things. You never went into your purse a single time that you recall?

LAURA EUTZY: No.

MR. LANG: You never go into your purse when you go into the bathroom?

LAURA EUTZY: No.

MR. LANG: The gun that has been shown to you as being the gun that you purchased and was in your purse that you carried with you, with the shells, have you had an occasion to hold it and feel it?

LAURA EUTZY: Yes.

MR. LANG: You can tell us that you don't know if that gun was in your purse or not?

LAURA EUTZY: No. The weight, with everything in my purse...there are a lot of weight to my purse.

MR. LANG: And you never, one time, to the best of your knowledge, from Friday or Saturday, all day Saturday, all day Sunday, Sunday night or Monday ever looked in your purse?

LAURA EUTZY: No; I did not.

(R.220-22)

Ms. Eutzy testified that she had her purse with her during the entire time she was in the back seat of the cab (R.222). A couple of times at the airport on Saturday morning, she gave the purse to appellant to hold while she went to the rest room (R.222-23). Ms. Eutzy acknowledged having told the police that the purse had never left her possession (R.223-24).

When she first spoke to the police, Ms. Eutzy did not mention anything about going to Panama City (R.224). In her statement to the police she did not mention appellant's remark about hitting and knocking out the cab driver (R.227). She also told the police that she had seen the gun in appellant's waistband on Saturday night (R.230-31). She said that all the officers coming in and out of the room had her confused, and she had no idea why she would have said that appellant had the gun in his waistband on Saturday night (R. 231).

On re-direct, Laura Eutzy testified that she did not tell the truth to the police in her first two statements because she was trying to protect appellant and to protect herself (R.236). She testified that she told the truth in her third statement to police, in her Grand Jury testimony, and in appellant's trial (R.236). On re-cross, Ms. Eutzy acknowledged that after she testified before the Grand Jury, the Grand Jury returned an indictment against her for first degree murder (R.237).

Dr. James Potter, a pathologist, performed an autopsy on Herman Hughley on February 27, 1983, and concluded that the cause of death was a gunshot wound to the head (R.241).

David Williams, a firearms identification specialist with the F.D.L.E., test fired the firearm recovered from Laura Eutzy's purse, and concluded that the bullet removed from the body of Herman Hughley was fired from that weapon (R.242-43,245-48). He further concluded that the empty cartridge case collected from the floorboard of the taxicab was fired from the same weapon (R.249).

Williams expressed the opinion that the gun was fired from a distance of three to six inches (R.250-51).

After the state rested its case (R.251), the defense moved for judgment of acquittal as to felony murder, on the ground that there was no evidence that the murder was committed in the course of a robbery or an attempted robbery (R.257). The following discussion occurred:

> MR. BERRIGAN [prosecutor]: Your Honor, I think there is sufficient evidence to show there was at least a cab fare of a certain value...
>
> THE COURT: Ninety dollars ($90.00) worth.
>
> MR. BERRIGAN: At least ninety dollars ($90.00) that was due and owing to Mr. Hughley, and that ...I think...
>
> THE COURT: He was found dead, there was nothing on him.
>
> MR. LANG [defense counsel]: Your Honor, there has been no evidence of any robbery or any taking of any money.
>
> THE COURT: Well, let's see; a certain person has been shown to be in the vicinity on or about or near the time of the offense, not too long thereafter, a cabdriver that they had seen alive and taken a trip was...persons described as probably being the same person that was seen at the time where the cabdriver was. The cabdriver was, not too long after that, found dead, and the testimony was that the cabdriver was taking the persons that were described allegedly to Pensacola Beach, Ft. Walton or maybe Panama City or maybe didn't get to Panama City, on a trip that would have been some ninety dollars ($90.00). The cabdriver was found dead with a bullet in the back of his head with absolutely no money from driving the cab, nothing on him, circumstantially robbery.
>
> MR. LANG: Excuse me for interrupting. I don't recall testimony that he didn't have anything on him, nor do I recall any testimony whatsoever that he wasn't paid.
>
> THE COURT: He was found dead, no monies.
>
> MR. LANG: Your Honor, I don't...Do you recall

the testimony...

THE COURT: I overruled the objection.

MR. LANG: Your Honor, I'm saying I don't believe there was any testimony that he did not have any money on his person, nor any evidence that he was robbed of anything, nor any evidence that he did not get paid for taking the trip.

THE COURT: All it takes, according to the law enforcement officers there was no money.

MR. BERRIGAN: There was also testimony that ...Laura Eutzy testified that Mr. Eutzy said he took care of him by knocking him out, and said he only had five dollars ($5.00). And she didn't have any money to pay him. It's at least a question for the Jury.

THE COURT: It's a question for the Jury, I think. Goes to the motive, too. Anything else?

MR. BERRIGAN: No, sir.

(R.257-59)

Following closing arguments of counsel and the trial court's instructions on the law, the jury retired to deliberate (R.269-294). In the midst of its deliberations, the jury submitted the following question to the trial court, "Explain what second degree and third degree murder are?" (R.294-95,374). The court informed the jury that they would recess for the night, and in the morning he would re-instruct them on all degrees of homicide (R.295-96). The next morning, the jury was re-instructed accordingly (R.297-304). The jury returned a verdict finding appellant guilty as charged of first degree murder with premeditation (R.304-05,375). The penalty phase of the proceeding was set for 2:00 o'clock that afternoon (R.309).

In the penalty phase, the state called Jack Shiver, the Escambia County corrections officer who interviewed appellant when he was booked into the jail, and introduced (over defense objection) a certified copy of a 1958 Nebraska

robbery conviction (R.311-21). Defense counsel argued to the jury that the state had established only one of the nine statutory aggravating circumstances; i.e. a previous conviction of a felony involving the use or threat of violence, specifically the 1958 robbery conviction (R.323-24,326). Defense counsel argued that appellant was forty-three years old and, if sentenced to life imprisonment with a twenty-five year mandatory, would be sixty-eight years old before even becoming eligible for parole (R.324). He further asked the jury to consider whether the testimony of Laura Eutzy, who had previously been a co-defendant in the case, would justify putting appellant to death (R.330-31). The prosecutor argued that the state had established three aggravating circumstances, and asked the jury to recommend the death penalty (R.327-29).

After the trial court instructed the jury[1] (R.331-34), the jury retired to deliberate, and returned with a verdict recommending that appellant be sentenced to life imprisonment without possibility of parole for twenty-five years (R.334-35,378). The court set sentencing for 9:00 o'clock the following morning, at which time he rejected the jury's recommendation and imposed a death sentence in its stead (R.335,341,376-77,382). After adjudicating appellant guilty of first degree murder (R.337,380), the trial court announced the following findings:

> Well, the Court finds, based upon the evidence and certified copy of the record of conviction of the Defendant for robbery, in the Defendant's statement to the Corrections'officer or booking officer that the record will substantiate he has been convicted of the crime of robbery on a prior occasion, and the Court finds that the evidence does substantiate the Defendant has been convicted of a prior offense involving use or threat of violence to a person to wit robbery. That is a felony and that is an aggravating circumstance.

[1] The penalty phase jury instructions will be set forth in the argument section of this brief under Issue IV.

Based on the evidence in this case and the circumstances, the Court finds the Defendant was, at the time of the homicide, even though the Jury did not so find, was committed while in the course of a robbery. The evidence reflecting that the Defendant and his associate or friend had between them only five dollars ($5.00), and that they took the cab from the [Municipal] Airport to a trip to Pensacola Beach, Ft. Walton, and possibility...possibility of Panama City. The testimony being the cost of the trip, one-way, to Panama City could be as much as ninety dollars ($90.00). Though it could be a negotiable...to a degree, and the Defendant's actions in having the cabdriver return his associate or friend to the University Mall Holiday Inn, and going away with the driver and having at some time taken the death with a .25 caliber pistol from the handbag of the associate or friend was at least manifesting an attempt at that time or formulating the idea of robbery, and which appears to be the [motivating] factor. Of course, in this offense and, in fact, a robbery was committed.

Another aggravating circumstance. The crime for which the Defendant should be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Again, the circumstances in the case bear out the Defendant, at some time prior to the instance, took from his associate or friend a .25 caliber automatic pistol, which was the death weapon, and left his friend or associate at the Holiday Inn at University Mall, and proceeded with the victim to the murder spot, which was some few miles from the Holiday Inn. That the victim was seen by one of the witnesses, a female, the Court can't remember distinctly her name. Seems to me like it was Hamel or Humel or something to that extent. I don't remember the exact name, but it was a female, a young girl. Which based on the evidence was a short time before the victim was killed. The evidence will show that the way in which the victim was killed will indicate no altercation or struggle.

Now, the ballistics expert, having testified that based on the powder residues on the victim's cap band that the death missle was fired from the weapon just a few inches from the point of entry. And the pathologist's report was that the victim was shot in the back of the head on the right side.

The Court's finding bears out a term for which the Defendant is to be sentenced. Was committed in a

cold, calculated and premeditated manner without any pretense of moral or legal justification. The Court therefore finds there are three aggravating circumstances in this case, while there were not mitigating circumstances at the penalty phase nor any evidence of circumstances during the trial of the substantive phase of this case of any mitigating circumstances.

Based upon these findings, the Court feels this Defendant has committed First Degree Capital Murder, and it's the sentence of the Court, in the judgment of the law, that this Defendant shall be handed the capital punishment sentence. He should be taken to [Raiford] and be executed at a time to be determined by the Governor of the State of Florida by electrocution.

(R.338-41, see R.376-77)

IV ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT TO DEATH, OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, IN VIOLATION OF THE PRINCIPLES ESTABLISHED IN TEDDER V. STATE, 322 So.2d 908 (Fla. 1975) AND SUBSEQUENT DECISIONS, AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has repeatedly held that a jury's recommendation as to the appropriate penalty reflects the conscience of the community and is entitled to great weight. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Provence v. State, 337 So.2d 783, 787 (Fla. 1976); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). In order for a trial court's override of a jury's recommendation of life imprisonment to be sustained on appeal, the reasons for his rejection of the jury's recommendation must be compelling ones. Burch v. State, 343 So.2d 831, 834 (Fla. 1977); Phippen v. State, 389 So.2d 991, 994 (Fla. 1980). See Thompson v. State, 328 So.2d 1, 5 (Fla. 1976)(trial court must express more concise

and particular reasons to overrule jury life recommendation and impose death sentence than to overrule death recommendation and impose life sentence); Smith v. State, 403 So.2d 933, 935 (Fla. 1981)(trial court failed to articulate any reason for rejecting jury's life recommendation, and failed to demonstrate how reasonable men would not differ on matter of sentencing). The trial court may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that virtually no reasonable person could differ". Tedder v. State, supra, at 910; Provence v. State, supra, at 787; McCampbell v. State, supra, at 1076; Herzog v. State, __So.2d__ (Fla. 1983)(case no. 61,513, opinion filed September 22, 1983)(1983 FLW 383, 386). Conversely, where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's, which must be given effect. Provence v. State, supra, at 787. This is true even if the judge's findings as to the aggravating and mitigating circumstances are also reasonable or supported by the evidence; where there is any view of the evidence from which the jury could reasonably have recommended life, the trial court is not free to substitute his own judgment to override it. See Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Chambers v. State, 339 So.2d 204, 208 (Fla. 1976)(England, J., concurring). "When there is disagreement between the jury and judge after both have evaluated the same data,...the jury's recommendation should generally prevail". Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977); see Gilvin v. State, supra; Cannady v. State, supra; Chambers v. State, supra (England, J. concurring).

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be fol-

> lowed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice.
>
> Chambers v. State, supra, at 208-09 (England, J. concurring)

Florida's capital sentencing procedure "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975); McCaskill v. State, 344 So.2d 1276 (Fla. 1977). While a sentence of death is normally presumed in the situation where there are aggravating circumstances and no mitigating circumstances [State v. Dixon, supra, at 9], a jury's recommendation of life militates against such a presumption. Williams v. State, 386 So.2d 538, 543 (Fla. 1980). This Court has recognized that juries, under Florida's death penalty statute, "have been reluctant to recommend the imposition of the death penalty in all but the most aggravated cases...". McCaskill v. State, supra, at 1280. Thus, a jury's recommendation of life imprisonment is reasonable if it may have been based on statutory or non-statutory mitigating circumstances (even if the trial court may not have been compelled as a matter of law to find them) [see e.g. Welty v. State, 402 So.2d 1159, 1164-65 (Fla. 1981); Gilvin v. State, supra, at 999; Cannady v. State, supra, at 731; Washington v. State, 432 So.2d 44 (Fla. 1983)]; and a jury's recommendation of life imprisonment is also reasonable if it may have been based on a determination that the aggravating circumstances are not of such an overwhelming nature as to set the crime apart from the norm of capital murders and as to require imposition of the death penalty [see e.g. Tedder v. State, supra; Provence v. State, supra; Williams v. State, supra; Phippen

v. State, supra; Webb v. State, 433 So.2d 496 (Fla. 1983); Richardson v. State, supra.

The jury's decision to recommend life imprisonment rather than the death penalty for William Eutzy in the instant case was a reasonable one. The trial court found three aggravating circumstances, two of which appellant contends were invalid as a matter of law [see Issues II and III, infra.] But even assuming arguendo that the evidence was legally sufficient to sustain the trial court's findings that the crime was committed in the course of a robbery and in a cold, calculated, and premeditated manner, the fact remains that the jury could easily and reasonably have concluded that these aggravating circumstances were not proven beyond a reasonable doubt. The state's highly speculative theory was that appellant killed Herman Hughley to avoid paying for the cab ride, and that this constituted a "robbery." There was no evidence as to whether or not Hughley habitually carried cash with him, and no evidence as to whether Hughley had any money on him when he was found dead on the seat of the cab. Laura Eutzy testified that she believed appellant had five dollars (R.203,219), but she conceded that she didn't know for a fact how much money he had, or whether he had any (R.219). There was no evidence as to whether appellant had any money on him at the time he was arrested. The state called a witness, Mary Beasley, a cabdriver with the same company as Herman Hughley, who testified emphatically, both on re-direct and re-cross, that for an out-of-county ride as far as Panama City, you would definitely collect your money up front, or you wouldn't go (R.134, 136). Yet, if one believes Laura Eutzy's testimony that she didn't think appellant had more than five dollars, and since she certainly did not testify that the cab driver was paid, or even that there was any discussion about the fare, then it appears that Herman Hughley, inexplicably, drove these people on a pointless four-hour cab ride to nowhere and back, after appellant twice changed his

mind about where he wanted to go, without asking to be paid in advance. Since Laura Eutzy testified that she had her purse (which was filled with cosmetics and grooming utensils, medicine tablets, identification papers, and other standard equipment, and which she claimed never to have occasion to open) in her possession the entire time she was in the back seat of the cab, but that she had given the purse to appellant to hold a couple of times at the airport when she went to the bathroom, then it would appear, according to the state's scenario, that appellant snuck the gun out of the purse at the airport, before they ever got into Herman Hughley's taxi. So the "cold, calculated, and premeditated" plan which appellant devised, in the state's view, would run something like this -- "I am going to sneak this gun out of my sister-in-law's purse, which she will not notice because she never opens it. We will then spend four hours in a taxicab riding to Panama City and back for no apparent reason. Then, since I know (even before getting into the cab in the first place) that I don't have anywhere near enough money to pay for the ride, I will have to kill the cab driver with the gun, and then I will give it back to my sister-in-law." The only evidence which would even tend to support the state's theory that the motive for the murder was to avoid paying the cab driver was Laura Eutzy's testimony (which she neglected to mention in her recorded statement to the police) that appellant had said he would "take care of" the fare, and that he told her when he returned that he had hit the driver and knocked him out; along with her "belief", which she admittedly did not know for a fact, that he only had five dollars. Laura Eutzy's testimony was thoroughly impeached in many respects; there were numerous inconsistencies between her various statements and her trial testimony, including several outright lies, which she attributed to being "scared" or "confused"; much of her testimony, particularly as to her claim of being unaware that the gun was missing from her purse, might have been considered by the

jury as highly implausible; and perhaps most significantly, her testimony could easily have been viewed as self-serving. She had originally been indicted for first-degree murder by the Grand Jury which had heard essentially the same testimony she gave at trial; the murder charge was dropped when the state apparently declined to traverse her motion to dismiss (see R.212-13); and she was testifying with the understanding that the state would recommend probation on the concealed weapon charge. It is entirely possible, and would be entirely reasonable, that the jury may have taken Laura Eutzy's testimony with a grain of salt, and still convicted appellant of first degree premeditated murder based primarily on David Williams' (of the F.D.L.E) testimony that the gun taken from Laura Eutzy's purse was the murder weapon, combined with Jackie Humel's testimony about having seen appellant and Herman Hughley at the cab near College and Tippen shortly before the murder would have taken place. The jury may or may not have believed Laura Eutzy's testimony, which was supported to some extent by that of the Holiday Inn security supervisor Meadows, that she was not present at the time of the actual shooting. The jury may well have believed that Laura Eutzy was far more deeply involved in the murder than she was willing to admit, and this would not have been inconsistent with their verdict finding appellant guilty of first degree murder. The main point is that between 1) the many gaps in the state's circumstantial evidence as to motive, 2) the various inconsistencies, implausibilities, and self-serving aspects of Laura Eutzy's testimony, 3) the illogic of the scenario suggested by the state, and 4) the fact that killing someone to avoid paying a debt (even assuming arguendo that such a motive were proven) is not a robbery [see Issue III, infra], the jury could very reasonably have concluded that the aggravating circumstances of "in the course of a robbery" and "in a cold, calculated, and premeditated manner" were not proven beyond a reasonable doubt. Under Florida law, any aggra-

vating circumstance must be established beyond a reasonable doubt before it can even be considered by the jury in weighing its penalty verdict [see State v. Dixon, supra; Phippen v. State, supra, Demps v. State, 395 So.2d 501 (Fla. 1981)], and the jury was properly so instructed (R.332). Thus, the jury could reasonably have found (as defense counsel argued) that the state had proven only one aggravating circumstance, i.e., a prior conviction involving the use or threat of violence. Moreover, the jury might reasonably have attached relatively little weight to this aggravating circumstance, in view of the fact that the Nebraska robbery conviction took place twenty-five years earlier, in 1958, when appellant was only eighteen years old. Further, the jury might reasonably have looked at the aggravating circumstances about which they were instructed which were clearly not present -- notably the aggravating factor of a crime committed in an especially heinous, atrocious, or cruel manner -- and concluded that the crime in the present case was not outside the norm of capital murders, and that, under the totality of the circumstances, imposition of the death penalty was not required. See State v. Dixon, supra; Provence v. State, supra; McCaskill v. State, supra.

The importance of the presence or absence of the "especially heinous, atrocious, or cruel" circumstance to the question of whether the jury's life recommendation, or the trial court's override and death sentence, will be sustained by this Court cannot be overstated. Contrast Buford v. State, 403 So.2d 943,954 (Fla. 1981)(recognizing that the trial court in that case, and in previous "life override" cases in which imposition of the death penalty was affirmed by this Court, was "unquestionably...swayed by the extreme heinousness and atrociousness of the crimes") with Tedder v. State, supra, at 910; Williams v. State, supra, at 543; Odom v. State, 403 So.2d 936,942 (Fla. 1981); McCray v. State, 416 So.2d 804,807 (Fla. 1982); and Herzog v. State, supra, (in each of which this Court

held that the trial court's finding of "especially heinous, atrocious, or cruel" was invalid, and in each of which the death penalty was reversed and the case remanded with instructions to impose a life sentence in accordance with the jury's recommendation). The significance of the "especially heinous, atrocious, or cruel" circumstance to the propriety of a trial court's "life override" is even more clearly illustrated by the following: of the 57 life override cases which have been decided to date by this Court, the death sentence has been approved in 19 of them.[2] Of those 19 cases, the "especially heinous, atrocious, or cruel" circumstance was found by the trial court in 18 of them. Of the latter 18 cases, this Court upheld the finding of "especially heinous, atrocious, or cruel" in 17 of them, and possibly all 18. [In Ziegler v. State, supra, in which four people were murdered, the trial court found the murders of Eunice Ziegler and Charles Mays to be especially heinous, atrocious, and evil; this Court determined that under the totality of the circumstances of this mass murder it was "immaterial" whether this finding was applicable to the murder of

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2 The cases in which this Court has affirmed the death penalty after the trial court's rejection of the jury's life recommendation are:

1. Sawyer v. State, 313 So.2d 680 (Fla. 1975)(February 19, 1975)
2. Gardner v. State, 313 So.2d 675 (Fla. 1975)(February 26, 1975)
3. Douglas v. State, 328 So.2d 18 (Fla. 1976)
4. Barclay v. State (Barclay), 343 So.2d 1266 (Fla. 1977)
5. Barclay v. State (Dougan), 343 So.2d 1266 (Fla. 1977)
6. Hoy v. State, 353 So.2d 826 (Fla. 1977)
7. Dobbert v. State, 375 So.2d 1069 (Fla. 1979)
8. Johnson v. State, 393 So.2d 1069 (Fla. 1980)
9. McCrae v. State, 395 So.2d 1145 (Fla. 1980)
10. Ziegler v. State, 402 So.2d 365 (Fla. 1981)
11. White v. State, 403 So.2d 331 (Fla. 1981)
12. Buford v. State, 403 So.2d 943 (Fla. 1981)
13. Miller v. State, 415 So.2d 1262 (Fla. 1982)
14. Stevens v. State, 419 So.2d 1058 (Fla. 1982)
15. Bolender v. State, 422 So.2d 833 (Fla. 1982)
16. Porter v. State, 429 So.2d 293 (Fla. 1983)
17. Spaziano v. State, 433 So.2d 508 (Fla. 1983)
18. Engle v. State, __So.2d__ (Fla. 1983)(case no. 57,708)(life override approved but remanded on other grounds)
19. Routly v. State, __So.2d__ (Fla. 1983)(case no. 60,066)

Eunice Ziegler, and expressed no opinion as to its applicability to the murder of Mays]. The only "life override" case which has been affirmed by this Court in the absence of a finding that the murder was especially heinous, atrocious, or cruel was Sawyer v. State, supra. Sawyer was the earliest life override case in which this Court affirmed the death penalty. Anthony Sawyer's sentence was subsequently mitigated to life imprisonment by the trial judge. And in his concurring opinion in Witt v. State, 387 So.2d 922,931 (Fla. 1980), Justice England observed that if Sawyer's case were reviewed under the standards subsequently developed, his death sentence would in all probability be vacated. All 18 subsequent decisions (with the possible exception of Ziegler) in which this Court approved a life override involved murders which were especially heinous, atrocious, or cruel -- murders "accompanied by such additional acts as to set the crimes apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, supra, at 9; Lewis v. State, 398 So.2d 432,438 (Fla. 1981). The cases in which the death penalty was affirmed notwithstanding the jury's recommendation of life virtually always contained one or more of the following factors which go into the "heinous, atrocious, or cruel" equation -- sexual assault [see Gardner, Douglas, Hoy, McCrae, Miller, Buford, Stevens, and Engle]; children or elderly people as victims [see Dobbert, McCrae, Buford, and Porter]; extreme physical brutality or torture [see Gardner, Dobbert, McCrae, Miller, Stevens. Bolender, Spaziano, and Engle]; and extreme mental anguish in anticipation of death [see Barclay, Hoy, White, Buford, and Routly]. Several of the cases involved multiple murders [see Hoy, Ziegler, White, Bolender, and Porter].

In the present case, the state did not even attempt to argue to the jury or the trial court the applicability of the "especially heinous, atrocious, or cruel" circumstance, nor could it have. Herman Hughley died from a single gun-

shot wound to the head, entering slightly behind and above the ear, fired from close range (R.241,250-51). There was no evidence that death was anything other than instantaneous. There was no evidence of any altercation or struggle. The victim was not bound. There was no evidence that he was aware that he was going to be killed, nor was there any evidence that he even knew that appellant was armed. In short, and as reprehensible as any premeditated murder is [see Williams v. State, supra, at 543], the state presentented nothing to set this crime apart from the norm of capital felonies. See State v. Dixon, supra; Williams v. State, supra; Lewis v. State, supra. This Court has held that an instantaneous death caused by a gunshot is not ordinarily an "especially heinous, atrocious, or cruel" killing. Cooper v. State, 336 So.2d 1133 (Fla. 1976); Williams v. State, supra, at 543, Lewis v. State, supra, at 438; Odom v. State, 403 So.2d 936,942 (Fla. 1981); McCray v. State, 416 So.2d 840,807 (Fla. 1982). See also Simmons v. State, 419 So.2d 316,318-19 (Fla. 1982) (instantaneous or nearly instantaneous death caused by hatchet blows was not "especially heinous, atrocious, or cruel," in absence of proof that victim was aware he was going to be struck). While it is true that an instantaneous death can nevertheless be especially heinous, atrocious, or cruel where the victim is subjected to prolonged agony over the prospect of his impending death [see e.g. White v. State, supra; Routly v. State, supra,] there was no evidence in the instant case to support a conclusion that Herman Hughley was aware that he was going to be shot (even if the trial court had made such a finding, which he did not).

In addition to the reasonable likelihood that the jury may have found only one aggravating circumstance (prior violent felony conviction), and may have determined that this crime was not outside the norm of capital murders so as to require imposition of the death penalty, the jury may also have taken into

consideration appellant's age (forty-three, which, as defense counsel pointed out, would mean that he would not even become eligible for parole until he was nearly seventy if a life sentence were imposed), and the fact that Laura Eutzy, appellant's sister-in-law, former co-defendant on the first degree murder charge, and chief accuser, was unlikely to receive anything more than probation. In State v. Dixon, supra, at 10, this Court recognized that any age, "whether youthful, middle aged, or aged" may be considered by the jury in mitigation in the penalty phase of a capital trial. This recognition comports with the United States Supreme Court's holding in Lockett v. Ohio, 438 U. S. 586 (1978) that any aspect of the character of the defendant or the circumstances of the offense must be available for consideration as a possible mitigating factor. The jury in present case obviously believed that a life sentence which ensures that appellant will remain incarcerated at least until age sixty-eight is, under the totality of the circumstances, the appropriate sentence, and in view of the fact that this murder was not accompanied by additional acts to set it beyond the norm of first-degree murders, it cannot be said that the jury's view of the evidence was "unreasonable". With regard to Laura Eutzy, as previously discussed, the jury could quite reasonably have believed that her role in the murder of Herman Hughley was far more culpable than her self-serving testimony would indicate. If the jury believed the state's other witnesses, notably David Williams and Jackie Humel, it could without inconsistency have convicted appellant of first degree premeditated murder even without giving much credence to Laura Eutzy's testimony about appellant's "motive" of avoiding the cab fare and about her blissful unawareness that the gun had been removed from her purse. [The jury's request during its deliberations for reinstructions on second and third degree murder would also tend to indicate that they were not swallowing Laura Eutzy's testimony whole]. The jury was aware that Laura Eutzy

had been indicted by the Grand Jury for first degree murder, and that the state had apparently allowed the charge against her to be dropped. The jury was aware that she was testifying with the understanding that the state would recommend probation on the charge of carrying a concealed weapon; the murder weapon which she had in her purse when she and appellant were arrested. It is likely that the jury had problems with her testimony that she went for days without ever opening her purse,* with the fact that she told the police in her recorded statement that she had seen the gun in appellant's waistband on Saturday night, and with numerous other aspects of her testimony. The jury could reasonably have been reluctant to recommend the death penalty when the evidence regarding the circumstances of the murder was so heavily dependent on the word of someone like Laura Eutzy. See also McCampbell v. State, supra, Herzog v. State, supra (recognizing that the disposition of co-defendants' cases may be a consideration supporting a jury's life recommendation).

It should also be emphasized that the trial court's sentencing order was not based on any information which was not available to the jury [see Brown v. State, 367 So.2d 616,625 (Fla. 1979); Smith v. State, supra; Herzog v. State, supra, 1983 FLW at 386], nor is there any indication that the jury was misled or unduly influenced by emotion [see McKennon v. State, 403 So.2d 389, 391 (Fla. 1981); Cannady v. State, supra; Herzog v. State, supra, 1983 FLW at 386]. Contrast White v. State, supra; Porter v. State, supra; Spaziano v. State, supra. The trial court expressed no compelling reasons for deviating from the jury's recommendation, nor were there any. Appellant's death sentence should be reversed and the case remanded with instructions to impose a life sentence without possibility of parole for twenty-five years, in accordance with the jury's recommendation.

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* Particularly in light of the testimony of the airport police officer Ferguson that Laura Eutzy produced a Louisiana drivers license from her purse (see R. 107, 115).

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The aggravating circumstance set forth in Fla.Stat. §921.141(5)(i), that "[t]he capital felony was a homicide and was committed in a cold, calculated, and premediatated manner without any pretense of moral or legal justification", requires proof by the state of a heightened degree of deliberation, above and beyond what is necessary to prove the element of premeditation for a conviction of first degree murder. Jent v. State, 408 So.2d 1024,1032 (Fla. 1981); Cannady v. State, supra, Washington v. State, 432 So.2d 44,48 (Fla. 1983); Richardson v. State, supra; Herzog v. State, supra. In Issue I, supra, appellant argued, inter alia, that the jury could reasonably have concluded that this circumstance was not proven beyond a reasonable doubt. For the reasons previously expressed, appellant further submits that the evidence was insufficient to support the trial court's finding that the murder was committed in a "cold, calculated, and premeditated manner." There are simply too many gaps in the circumstantial evidence as to motive to demonstrate beyond a reasonable doubt why this murder was committed, mush less when appellant decided to commit it. The location of the single bullet wound is circumstantial proof of premeditation, but it is not sufficient to prove the "premeditation-plus" required to establish the "cold, calculated, and premeditated" aggravating circumstance. See Cannady v. State, supra; Washington v. State, supra. The state's hypothesis that appellant had formulated a plan as early as Saturday afternoon in the airport to secretly remove his sister-in-law's gun from her purse, take a pointless four-hour cab ride to Panama City and back, and shoot the cab driver in lieu of paying the fare, would be such bizarre behavior that some solid proof

should be required before assuming that that was appellant's motive.

Appellant wishes to reiterate, however, that even assuming arguendo that this Court concludes that the trial court's finding of the "cold, calculated, and premeditated" circumstance was supported by the evidence, that is a far cry from saying that the jury was compelled, as a matter of law or at the risk of being labeled "unreasonable", to find it. Possibly the judge and jury assessed Laura Eutzy's credibility differently, and reached differing conclusions as to the weight to be given her version of the circumstances of the crime. If so, it is the jury's determination which should prevail. See Gilvin v. State, supra, Cannady v. State, supra, at 731; Chambers v. State, supra (England, J. concurring).

ISSUE III

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN THE COURSE OF A ROBBERY.

Appellant would again emphasize that, this being a "life override" case, that the crucial question here is whether the jury was required as a matter of law or as a matter of reason to find that this murder was committed in the course of a robbery. The trial court in his findings of fact stated, "That based upon the evidence in this case and the circumstances the Court finds the defendant was at the time of the homicide, even though the jury did not so find[3], was committed while in the course of a robbery..." (R.376). As

[3] The verdict form given to the jury included the options of first degree murder with premeditation and first degree felony murder, as well as lesser degrees of homicide and not guilty (R.375). The jury was instructed to check only one blank (R.294). Thus the jury's guilty verdict of premeditated murder apparently does not conclusively establish that they found that the murder was not committed in the course of a robbery. However, in view of their life recommendation, in view of the weakness of the evidence as to motive and the implausibility of the state's hypothesis, and especially since (as will be argued infra) a killing to avoid a debt is not a robbery, it is both likely and reasonable that the jury found neither felony murder nor this aggravating circumstance.

previously discussed, when there is disagreement between the judge and jury after both have evaluated the same data, it is the jury's recommendation which should generally prevail. Barclay v. State, supra; Gilvin v. State, supra; Cannady v. State, supra; Chambers v. State, supra (England, J. concurring).

Appellant further submits that the evidence was legally insufficient to support the trial court's finding that the murder was committed in the course of a robbery. First, the state failed to prove beyond a reasonable doubt that appellant's motive for committing this murder was to avoid payment of the cab fare [see Issue I and II, supra]. But even assuming arguendo that such motivation were proven, the facts would not fall within the definition of a robbery. "[Robbery] means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear." Fla.Stat. §812.13. In order to constitute a robbery, there must be a taking or asportation. Johnson v. State, supra. The force, violence, or intimidation must precede or be contemporaneous with the taking of the property. Monstdoca v. State, 84 Fla. 82,86,93 So. 157 (1922); McCloud v. State, 335 So.2d 257,258 (Fla. 1976). In Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983), the majority of the Third District Court of Appeal panel concluded that, under §812.13(3), force or threat of force is considered to be contemporaneous with the taking if that force or threat of force is used to overcome a victim's resistance to an attempted asportation. The court said:

> We hold that where an offender gains possession of property of another without force and with intent to deprive the true owner of its use, but the victim gives instant and uninterrupted protest or pursuit in an effort to thwart a taking, and the offender then assaults the victim in order to complete a taking of the property and make good an escape, the offense is robbery.

Stufflebean v. State, supra, at 246.

In Stufflebean, the victim was painting in a park with a cassette radio beside him. The defendant and a companion took the radio and fled, with the victim in pursuit. When the victim caught up with him, the defendant brandished a knife. The victim backed away, and demanded the return of the radio, which the defendant refused. Judge Baskin, dissenting, took the position that the threat of force used to retain the property in the face of the victim's resistance does not constitute a robbery under Florida's statute, and noted that subsection (3), relied on by the majority, relates only to the sentencing portion of the robbery statute and not to the definition of the crime.

Regardless of whether the majority or dissenting view in Stufflebean ultimately prevails, the state's hypothesis in the instant case (even if it had been proven) would not support a finding that Herman Hughley was killed in the course of a robbery. Obviously the state did not prove that any money was taken from Hughley, since there was no evidence as to whether he had any cash prior to picking up appellant and Laura Eutzy, no evidence as to whether he habitually carried any cash, and no evidence as to whether there was any money on his person when he was found dead in the cab. Laura Eutzy believed that appellant had only five dollars, but she did not know for a fact whether he had any money, or how much. There was no evidence as to whether appellant had any money when he was arrested. So, if there was a "taking" of property in this case, it must have been the taking of a service provided by Herman Hughley, i.e., the cab ride to Panama City and back. The state would first have needed to prove that appellant intended to deprive Hughley of his property by not paying him for the ride. There was no proof of such intent. Laura Eutzy admitted that she did not know how much money appellant might have had. Mary Beasley testified that the round-trip to Panama City would probably cost about $135, but she also testified that the cab drivers are supposed to collect

the money before leaving town on such a long trip. Yet Herman Hughley evidently did not do so. There was no evidence that there was any discussion between Hughley and appellant about the fare. Thus, the state's assumption that appellant intended from the beginning to deprive Herman Hughley of the cab fare, like the state's assumption that that is why he shot him, is based on speculation rather than proof.

Further, there was no evidence that the "taking" of the cab ride was accomplished by force, violence, assault, or putting in fear. The only force or intimidation established by the evidence was the shooting of Hughley, which occurred after the drive to Panama City and back, and after (asssuming the jury believed her testimony on this point) Laura Eutzy was dropped off at the Holiday Inn. So the only conceivable theory under which a robbery could have occurred on this case would be under the analysis employed by the majority in Stufflebean, if the force was used in an effort to retain the property (i.e., the unpaid-for cab ride) as against the victim's effort to get it back. However, even assuming that the state had proven that appellant had formulated the intent not to pay for the ride, there is no evidence that Herman Hughley was aware that he was not going to be paid. In People v. Clark, 317 NW2d 664 (Mich.App.1982), the following facts were held not to constitute a robbery. While the victim, a truck driver, was inside a store being paid for a delivery, the defendant entered his truck and took $400 from a safe. The truck driver came back to the parking lot and saw the defendant walking away from his truck. The driver continued walking toward his truck, whereupon the defendant brandished a crowbar and said "Come any closer and I'll bash your brains out". The defendant turned and ran, and was chased by the driver. At that point in time, the driver was unaware that anything had been taken from his truck. The Michigan Court of Appeals concluded that, while there may have been

a burglary of a vehicle, a theft of money, and a felonious assault against the truck driver, these acts did not amount to a robbery:

> In this case it does not appear that the victim was in such a situation where, but for violence or fear, he could have prevented his loss, because he did not have knowledge of the loss until after the defendant had escaped. What the defendant's assault on the complainant did in this case was to prevent complainant's opportunity to discover the loss before the defendant escaped.
>
> People v. Clark, supra, at 666

Since there was no evidence that Herman Hughley was aware that he was not going to be paid for the cab ride, there is also no evidence that Hughley made any attempt to thwart any effort by appellant to "retain" the benefit of the ride without paying for it. See Stufflebean v. State, supra. There is no evidence that Hughley ever demanded payment from appellant, no evidence that there were even any discussions or negotiations about payment. Therefore, even assuming arguendo that the state were correct in hypothesizing that appellant's subjective motivation for shooting Herman Hughley was to avoid having to pay for the cab ride, that is not a robbery. The evidence does not establish that the force preceded or was contemporaneous with the "taking", that the force was used to overcome any resistance by the victim to an attempted asportation, or that the victim even knew that his property had been taken. Montsdoca v. State, supra; Stufflebean v. State, supra; People v. Clark, supra. Not only could the jury have reasonably declined to find that this murder was committed in the course of a robbery [see Issue I, supra], but the trial court's contrary finding that it was committed in the course of a robbery is unsupported by the evidence and invalid as a matter of law.

ISSUE IV

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY IN THE PENALTY PHASE WERE CONSTITUTIONALLY INADEQUATE.

The trial court's instructions to the jury in the penalty phase of this trial read as follows:

> Ladies and gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of First Degree Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist, to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard and that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to the following that are established by the evidence. The Defendant has previously been convicted of another offense or a felony involving the use or threat of violence to some other person. The crime of robbery is a felony involving the use or threat of violence to another person. The crime for which the Defendant is to be sentenced was committed while he was engaged in the crime of robbery. And the crime for which the Defendant is to be sentenced was committed in the cold, calculated and premeditated manner, without any pretense or moral or legal justification.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it can be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider

all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. Mitigating circumstances need not be proved beyond a reasonable doubt by the Defendant if you are reasonably convinced that mitigating circumstances exist; you may consider it as established.

The sentence you recommend to the Court must be based upon the facts, as you find them, from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations. In these proceedings it is not necessary that the advisory sentence of the Jury be unanimous. Your decision may be made by a majority of the Jury.

The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment, in this case, can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is a stake, and bring to bear your best judgment in reaching your advisory sentence. If a majority of the Jury determines that the Defendant should be sentenced to death, your advisory sentence will be a majority of the Jury by a vote of whatever number advise and recommend to the Court that it imposed the death penalty upon the Defendant. On the other hand, if by six or more votes the Jury determines that the Defendant should not be sentenced to death, your advisory sentence will be...the Jury advises and recommends to the Court that it imposes a sentence of life imprisonment upon the Defendant without possibility of parole for twenty-five years.

You will now be able to retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to this Court, that form of recommendation should be signed by your foreman and returned to the Court.

As you will note, I have used mitigating circumstances and have eluded there have been no mitigating cir-

> cumstances in these proceedings. I want to make one word of caution. You are to take into consideration the entire proceedings into your deliberation, and in those deliberations, if you find any mitigating circumstances you may consider them also. That's why I used it in this phase of the proceedings.

In these instructions, the trial court essentially instructed the jury that three aggravating circumstances were established by the evidence, and told them what they were. [Two of these circumstances, "in the course of a robbery" and "cold, calculated, and premeditated", are questionable at best -- see Issues I, II, and III, supra]. He then, for all intents and purposes, instructed them that there were no mitigating circumstances. The judge told the jury they could consider any mitigating circumstances which may have been established in the guilt phase, but he did not tell them what a mitigating circumstance is, and did not mention any of the seven mit. ating circumstances enumerated in Fla.Stat.§921.141(6). Among the statutory mitigating circumstances of which the jury was not instructed is the age of the defendant. This circumstance was argued by defense counsel as a consideration in support of a life sentence, i.e. that appellant would be nearly seventy years old before even becoming eligible for parole.

Notwithstanding the apparent lack of an objection, the trial court's instructions in the penalty phase were wholly inadequate to inform the jury about the nature and function of mitigating circumstances, and were therefore constitutionally deficient. See Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983).

The state may contend that any error in the penalty phase jury instructions is rendered harmless by the fact that the jury recommended life imprisonment, and appellant would agree, but only if the jury's life recommendation is given

effect by this Court. If, on the other hand, the trial court's override is sustained, then to say that the inadequate jury instructions were "harmless" would be tantamount to saying that the jury doesn't need to be properly instructed, because its recommendation is meaningless anyway. That is not the case. As this Court observed in Richardson v. State, supra:

> It is a defendant's right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function. Lamadline v. State, 303 So.2d 17 (Fla. 1974). We cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors after all parties have agreed on the appropriate evidence to be considered.

ISSUE V

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS APPLIED.

This Court, relying on the United States Supreme Court's approval of Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242 (1976), has rejected constitutional challenges to the trial court's statutory authority to override a jury's life recommendation. See e.g. Douglas v. State, 373 So.2d 895 (Fla. 1979); Johnson v. State, supra; Porter v. State, supra, Routly v. State, supra. It is appellant's position that the assumption which underlies all of the decisions upholding the constitutionality of the override procedure -- i.e. that the override is designed as a safeguard against unreasoned imposition of the death penalty -- has proven to be faulty. The override option, in practice, is not a safeguard but a gauntlet; a "fall-back" opportunity for the state to persuade the judge to impose the death penalty, in the event that it fails to persuade the jury. For this reason, appellant

submits that the trial court's authority to override a jury's life recommendation is, as applied, violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

In Dobbert v. Florida, 432 U.S. 282 (1977) the defendant contended that application of Florida's post-Furman death penalty statute in his case violated the prohibition against ex post facto laws, since the crimes of which he was convicted occurred before the enactment of the statute. He claimed, inter alia, that at the time the offenses were committed, the trial court was without authority to override the jury's recommendation of mercy, while under the new statute a life recommendation could be (and in his case, was) overridden. The Supreme Court held that the ex post facto clause was inapplicable, characterizing the changes in the law as procedural and "on the whole ameliorative". Dobbert v. Florida, supra, 432 U.S. at 292. Referring to the Tedder standard, the Court said:

> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute.
>
> Dobbert v. Florida, supra, 432 U.S. at 295-96

In State v. Dixon, supra, the case in which this Court upheld the constitutionality of Florida's death penalty statute, it said:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found

> guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty -- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

Specifically addressing the third of these safeguards, the trial court's authority to reject the jury's recommendation, the Court said:

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.
>
> State v. Dixon, supra, at 8.

In Thompson v. State, supra, the Court wrote:

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

Even before the Furman decision, the possibility of a two-step jury determination of guilt and punishment in capital cases was suggested by Chief Justice Urvin, concurring in Perkins v. State, 228 So.2d 382,394 (Fla. 1969). He further suggested:

> Possibly a jury's decision to recommend or not to recommend mercy in a capital case should not be held to preclude the trial judge from determining

> in his sound discretion the punishment to be imposed upon the defendant in a capital case, provided the defendant timely requests an allocutionary hearing and a final determination by the trial judge of the sentence to be imposed. If such a hearing is requested the jury's nonrecommendation of mercy could be deemed as advisory only. The allocutionary hearing could be held by the trial court as a part of the jury's determination concerning a recommendation, or afterwards, in the discretion of the trial judge.

The only other states which permit a trial judge to impose a sentence of death notwithstanding the jury's recommendation of life are Indiana and Alabama. See Judy v. State, 416 NE2d 95 (Ind.1981); Brewer v. State, 417 NE2d 889,898 (Ind.1981); Bush v. State, 431 So.2d 555,559 (Ala.Cr.App.1982). [Each of these cases refers to the override procedure in their respective statutes, but none of them is a "life override" case. As far as appellant has been able to determine, neither the Indiana nor the Alabama appellate courts have yet had occasion to decide a case in which a trial court overrode a jury's life recommendation and imposed a death sentence. In contrast, the Florida Supreme Court has decided 57 such cases and many more are pending]. The Indiana Supreme Court first had occasion to review a death sentence imposed under its present statute in Judy v. State, supra at 108, and stated:

> Our review of these various constitutional and statutory requirements and our rules satifies us that our sentencing scheme passes constitutional muster. Under our procedure, the sentencing authority's discretion, as exercised by the jury and the trial court, "is guided and channeled by requiring examination of specific factors that argue infavor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, supra, 428 U.S. at 258, 96 S. Ct. at 2969, 49 L.Ed.2d at 926. Significantly, in cases tried to a jury, the trial court may not simply rely solely on the jury's advice; rather, he must conduct this analysis independent of the evaluation and recommendation made by the jury. In this fashion, the trial court, as the actual sentencing authority, provides an additional safeguard against a death penalty recommendation

which may have been prompted by improper factors. Of course, the trial court must analyze the case in the same independent manner if it is tried only to him.

The fact that Florida trial courts, in practice, make liberal use of the override option to impose a death sentence despite a life recommendation is instantly revealed by a glance at Walsh v. State, 418 So.2d 1000,1003-04 (Fla. 1982). In its July 29, 1982 opinion in Walsh, this Court listed 8 cases in which it had affirmed a death sentence imposed after a life recommendation override, and 23 cases in which it had reversed a death sentence imposed after a life recommendation override, with directions to impose a life sentence. Walsh itself falls into the latter category. Nine "life override" cases decided up to that point were not listed in Walsh.[4] Fourteen "life override"cases have been decided in the sixteen months since Walsh.[5] Two

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[4] Taylor v. State, 294 So.2d 648 (Fla. 1974)(death sentence reversed); Gardner v. State, 313 So.2d 675 (Fla. 1975)(death sentence affirmed); Sawyer v. State, 313 So.2d 680 (Fla. 1975)(death sentence affirmed); McCrae v. State, 395 So.2d 1145 (Fla. 1980)(death sentence affirmed); Jacobs v. State, 396 So.2d 713 (Fla. 1981)(death sentence reversed); Lewis v. State, 398 So.2d 432 (Fla. 1981)(remanded for resentencing); Miller v. State, 415 So.2d 1262 (Fla. 1982)(death sentence affirmed); McCray v. State, 416 So.2d 804 (Fla. 1982)(death sentence reversed); and Gilvin v. State, 418 So.2d 996 (Fla. 1982)(death sentenced reversed).

[5] Stevens v. State, 419 So.2d 1058 (Fla. 1982)(death sentence affirmed); Bolender v. State, 422 So.2d 833 (Fla. 1982)(death sentence affirmed); McCampbell v. State, 421 So.2d 1072 (Fla. 1982)(death sentence reversed); Porter v. State, 429 So.2d 293 (Fla. 1983)(death sentence affirmed); Morris v. State, 429 So.2d 688 (Fla. 1983)(death sentence reversed); Cannady v. State, 427 So.2d 723 (Fla. 1983)(death sentence reversed); Webb v. State, 433 So.2d 496 (Fla. 1983)(death sentence reversed); Washington v. State, 432 So.2d 44 (Fla. 1983)(death sentence reversed); Spaziano v. State, 433 So.2d 508 (Fla. 1983)(death sentence affirmed); Hawkins v. State, 436 So.2d 44 (Fla. 1983)(death sentence reversed); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(death sentence reversed); Engle v. State, __So.2d__ (Fla. 1983)(remanded but life override approved); Herzog v. State, __So.2d__ (Fla. 1983)(death sentence reversed); Routly v. State, __So.2d__ (Fla. 1983)(death sentence affirmed).

decisions involved co-defendants who were both sentenced to death after each received a life recommendation.[6] Altogether, this Court has reviewed 57 death sentences imposed under the present statute after a jury recommended life. Treating Engle v. State as an affirmance and Lewis v. State as a reversal, there have been 19 occasions in which this Court has affirmed a death sentence following the trial court's override of the jury's life recommendation.

In stark contrast, the occasions in which a trial judge has utilized the "safeguard" of the override procedure to reject a jury recommendation of death -- the original and primary justification for the availability of the override option -- are few and far between. It is not possible to say exactly how rare a creature is the "death recommendation override" for the reason pointed out by Justice England, dissenting as to penalty in Alvord v. State, 322 So.2d 533, 542 n.2 (Fla. 1975):

> Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases.

If this Court believes that appellant's contention that the override option is used almost exclusively by trial courts to override jury life recommendations and to impose death sentences is insufficiently documented (and he concedes that it is), appellant requests that the Court direct the Circuit Courts of the state to compile a list of cases in which death recommendations have been overridden and life sentences imposed. See State v. Dixon, supra, at 8, in which this Court, under its constitutional power to regulate practice and procedure, required written findings in support of a decision to impose life imprisonment rather than

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[6] Barclay v. State, 343 So.2d 1266 (Fla. 1977)(Barclay and Dougan, death sentences affirmed); McCaskill v. State, 344 So.2d 1276 (Fla. 1977)(McCaskill and Williams, death sentences reversed).

death, in order to afford "an additional safeguard for the defendant sentenced to death, [providing] a standard for life imprisonment against which to measure the standard for death established in the defendant's case...".

The glaring imbalance between the use of the override to nullify jury life recommendations and its non-use for its primary intended purpose as a safeguard against unreasonable death recommendations is indicative of a serious malfunction in the operation of the Florida death penalty statute. Either this state has a severe problem with unreasonably lenient jurors (a possibility which appellant submits is remote, especially in light of the fact that death penalty juries do not include those citizens of the state who would never impose the death penalty regardless of the circumstances)[7] or else there is a clear pattern of abuse of the override option on the part of trial judges. This Court's review under the Tedder standard does not cure the problem. As the Fifth Circuit Court of Appeals observed in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." If a death sentence following a jury recommendation of life can be sustained only where no reasonable person would differ, does this mean that Justices McDonald and Overton were unreasonable to dissent in Stevens v. State, supra, Miller v. State, supra, and Johnson v. State, supra? Was Justice England unreasonable to dissent in Hoy v. State, 353 So.2d 826 (Fla. 1977), and was Governor Graham unreasonable to grant clemency in Hoy's case? Was Justice Boyd unreasonable to dissent as to one of the co-defendants in Barclay v. State, 343 So.2d 1266 (Fla. 1977)?

The impossibility of proper review under the Tedder standard as presently applied is further demonstrated by the fact that the jury makes no express

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[7] See e.g. Witt v. State, 342 So.2d 497, 499 (Fla. 1977); Downs v. State, 386 So.2d 788, 790-01 (Fla.1980), upholding the practice of "death-qualifying" jurors in capital cases.

findings in support of its recommendation of life or death. Thus, while the result on appeal of a life recommendation override turns on whether the jury's recommendation was "reasonable" or "unreasonable", the absence of specific findings makes it impossible for the reviewing court even to know what the basis for the jury's recommendations was. As a result, the parties and the Court must speculate about the reason for the recommendation [see Gilvin v. State, supra, (Boyd, J. dissenting from reduction of sentence)] before reaching a conclusion as to its validity. When applied in this manner, the Tedder standard is simply too amorphous to pass constitutional muster.

As asserted in the beginning of this Point on Appeal, the trial court's override power has proven not to be a safeguard against unreasonable jury recommendations of death. Assuming arguendo that the state has a valid interest in ensuring against "unreasonable" recommendations of life, that interest is already more than adequately protected by the state's ability to weed out prospective jurors who adamantly oppose the death penalty, and by the fact that a Florida penalty jury's recommendation need not be unanimous (thus preventing one or two or even five "unreasonable" jurors from blocking a reasonable death recommendation). Only in the event that six to all twelve members of the jury, all of whom have stated under oath that they will follow the law and can impose the death penalty under appropriate circumstances, conclude that under the circumstances of the particular case the death penalty is not appropriate, is a life recommendation returned.

In determining whether a penal sanction comports with the Eighth Amendment ban against cruel and unusual punishment, assessment of contemporary values is required. Trop v. Dulles, 357 U.S. 86, 100-01 (1958); Gregg v. Georgia, 428 U.S. 153, 175 (1976). The critical function performed by capital

sentencing juries in assessing Eighth Amendment values was aptly described in Witherspoon v. Illinois, 391 U.S. 510, 519-20 and n.15 (1968):

> [A] jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death.
>
> * * *
>
> And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that marks the progress of a maturing society.'

A jury's life recommendation reflects the determination that, in the individual case before it, imposition of the death penalty does not accord with contemporary values. Only three states, Florida, Indiana, and Alabama, have death penalty statutes which permit a jury's recommendation of life to be nullified. Only in Florida does it appear that jury life recommendations are commonly, perhaps even routinely, ignored. [See Burch v. Louisiana, 441 U.S. 130, 138 (1979), recognizing that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"]. Florida's override procedure has been approved by the United States Supreme Court and this Court on the assumption that it serves as a safeguard against unreasoned jury death verdicts. It is becoming more and more apparent that the override does not serve this function, and that in fact it operates in many cases, as in the present case, to deprive a capital defendant of an entirely reasonable life verdict. For this reason, the constitutionality of a trial judge's authority to override a jury's life recommendation can no longer be upheld.

V CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his sentence of death and remand this case to the trial court with directions it impose a sentence of life imprisonment without possibility of parole for twenty-five years in accordance with the jury's recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Larry Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, William Eutzy, #090408, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 28th day of November, 1983.

STEVEN L. BOLOTIN

IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

v. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,	:	
Appellant,	:	
v.	:	CASE NO. 64,212
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in appellant's initial brief. This reply brief is directed to Issue V; appellant will rely on the arguments advanced in his initial brief as to Issues I through IV.

II ARGUMENT

ISSUE V

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS APPLIED.

In complacently failing to address this argument, the state has put all its eggs in one basket -- that of "preservation". Rather than attempting to defend the constitutionality of the "life override" provision, the state's only concern seems to be to enlist this Court's aid in preventing the federal courts from considering this issue. [In this regard, it is worth noting that the United States Supreme Court has granted certiorari in Spaziano v. Florida, __ U.S. __ (1984)(34 Cr.L. 4159); two of the three issues presented in Spaziano are whether the trial court's override of the jury's factually based decision against the death penalty violates, in all cases, the Fifth, Sixth, and Fourteenth Amendments, and whether this Court, in affirming death sentences, has adopted such broad and vague application of standards governing the decision to override a jury's life verdict as to violate the Fifth, Sixth, Eighth, and Fourteenth Amendments].

The state blithely asserts, without citing any authority, that appellant's claim that the imposition of a death sentence notwithstanding the jury's recommendation of life imprisonment is unconstitutional "does not involve 'fundamental error'" (AB. 23). Needless to say, appellant disagrees. In Castor v. State,

365 So.2d 701, 704 n.7 (Fla. 1978) this Court noted that "for an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." If appellant is correct on the merits of his argument that a jury's recommendation of life imprisonment cannot constitutionally be overridden by the trial court, then the imposition of the death penalty under those circumstances would clearly amount to a denial of due process. When the then-existing death penalty statutes were declared unconstitutional as applied in Furman v. Georgia, 408 U.S. 238 (1972), the holding of that case applied to all persons sentenced to death under those statutes, not just those defendants who had made a contemporaneous objection at trial. Similarly, if this Court in the instant case, or the United States Supreme Court in Spaziano, should hold that the "life override" provision of Florida's death penalty statute is unconstitutional, on its face or as applied, then no defendant who has received a jury recommendation of life can constitutionally be executed, whether he objected on these grounds at trial or not.

Aside from the fundamental character of the issue, appellant also wonders at what point in the proceedings the state would have had him raise it. In its brief, the state says "[c]onsequently, since this issue could have been raised prior to trial, the issue has been waived and is not properly before the Court." (AB.23). It should be noted that appellant did file a number of pre-trial motions challenging the constitutionality of the death penalty statute and several of the aggravat-

ing circumstances enumerated therein (R.348-49, 352-53, 358-73). Among the grounds stated is that although this Court and the U. S. Supreme Court have upheld the facial constitutionality of Florida's death penalty statute as against Eighth Amendment challenges, the death penalty has, in fact, been administered and applied in a manner which is inconsistent with the Courts' decisions (R.364). The trial court denied these motions at trial (R.252-57). The state contends on appeal that appellant has waived his constitutional arguments against the trial court's rejection of the jury's life recommendation and his imposition of a death sentence in its stead by failing to raise these arguments prior to trial. Appellant submits that raising constitutional objections to the life override at that point would have been premature and speculative. It assumes in advance that 1) the defendant will be convicted of first degree murder, 2) that the jury will recommend life, and 3) that notwithstanding the "great weight" that a life recommendation is supposedly entitled to,[1] the trial court will reject it and impose a death sentence. Since, in theory, a life recommendation cannot be overridden except in the extraordinary circumstance where "virtually no reasonable person could differ" from imposition of a death sentence, defense counsel should reasonably be able to assume that if the jury recommends life imprisonment, his client will be sentenced to life imprisonment. [In reality, of course, that is not a safe assumption, because the Tedder standard is incapable of fair or consistent application]. If the jury

[1] See e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975).

recommends life, should defense counsel at that point submit arguments challenging the trial court's authority to reject the recommendation, at the risk of goading the court into doing that very thing? (which it might otherwise not have been considering).

A final and compelling reason why this Court should not invoke a "contemporaneous objection" rule to preclude reaching the merits of this issue was inadvertently recognized in the state's own brief (AB.24) -- that is the fact that this Court in previous decisions has addressed on direct appeal the merits of constitutional objections to imposition of the death penalty notwithstanding the jury's life recommendation, and has not applied a "contemporaneous objection" rule to avoid consideration of this fundamental issue. Thus, if this Court were to now decline to consider the merits of appellant's constitutional argument based on the state's claim of procedural default, this would amount to a novel application of the contemporaneous objection rule to an issue of this character, and would not preclude federal review in any event. See Spencer v. Zant, 715 F.2d 1562, 1572-72 (11th Cir. 1983); see also NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); Wright v. Georgia, 373 U.S. 284, 291 (1963); Breest v. Perrin, 655 F.2d 1, 2-3 (1st Cir. 1981).

Turning briefly to the merits, appellant would call the Court's attention to the fact that, in the past month, it has affirmed two more death sentences which were imposed notwithstanding jury life recommendations. Lusk v. State, __ So.2d __

(Fla. 1984)(case no. 59,146, opinion filed January 26, 1984); Heiney v. State, __ So.2d __ (Fla. 1984)(case no. 56,778, opinion filed February 2, 1984).[2] This brings the total to 21 post-Furman cases in which a majority of this Court determined that no reasonable person could differ from a death sentence, even though in each of those cases anywhere from six to all twelve members of a death-qualified Florida jury believed that life imprisonment was the appropriate sentence. These "unreasonable" juries are the same ones which convicted the defendants of first-degree murder, yet this Court refrains from second-guessing that verdict. See e.g., Tibbs v. State, 397 So.2d 1120 (Fla. 1981); Heiney v. State, supra. The appellate courts of this state have repeatedly stated and followed the principles that jurors are presumed to live up to the obligations of their oaths [see e.g., Burnette v. State, 157 So.2d 65 (Fla. 1963), Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)] and that jurors are presumed to follow the instructions of the court [see e.g., McGee v. State, 304 So.2d 142 (Fla. 2d DCA 1974); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981)]. In Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), this Court observed that "[t]he law requires that juries be composed of persons of sound judgment and intelligence, and it will not be presumed that they are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." See also James v. State, 334 So.2d 83 (Fla. 3d DCA 1976). Only

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[2] Referring back to Issue I, it should be noted that in both Lusk and Heiney, this Court upheld the trial court's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance. See appellant's initial brief at pages 25-28.

when a jury returns a verdict recommending life imprisonment rather than a death sentence does this Court seem willing to stand these principles on their heads and assume that the jurors violated their oaths, ignored the instructions, or were led astray to an "unreasonable" verdict by impassioned eloquence and illogical pathos. [See, for example, Porter v. State, 429 So.2d 293, 296 (Fla. 1983), in which this Court, in affirming the death sentence imposed notwithstanding the jury's life recommendation, assumed that the jury "might well have been swayed by defense counsel's reading of an 'extremely vivid and lurid' description of an electrocution"[3] which "might well have been calculated to influence the recommendation of a life sentence through emotional appeal"].

For the reasons discussed in appellant's initial brief and in this reply brief, appellant submits that the provision of Florida's death penalty statute authorizing the trial court to override a jury's recommendation of life imprisonment and to impose a death sentence in its stead is violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution in the manner in which it has been applied by the trial courts of this state and by this Court. The original and primary justification for the override procedure was that it was to serve as a safeguard against unreasonable jury death recommendations. See Dobbert v. Florida, 432 U.S. 282, 295-96 (1977); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973);

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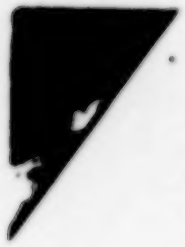
[3] This description of an electrocution was read to the jury by defense counsel with the permission of the trial court and without objection by the state. See Porter v. State, 400 So.2d 5, 8 (Fla. 1981)(Alderman, J., concurring).



Thompson v. State, 328 So.2d 1, 5 (Fla. 1976); Judy v. State, 416 N.E.2d 95, 108 (Ind. 1981). Instead, it has become starkly apparent that the real function of the override has been to give the state a second shot at a death sentence when it fails to persuade the jury. The trial court's imposition of the death penalty, in contravention of the jury's life verdict, can no longer withstand constitutional scrutiny.

III CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court reverse the death sentence imposed in this case and remand to the trial court with directions to impose a sentence of life imprisonment without possibility of parole for twenty-five years in accordance with the jury's recommendation.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

vs. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

RECEIVED
JAN 17, 1984
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

ANSWER BRIEF OF APPELLEE

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IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

vs. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

William Eutzy was the defendant below and will be referred to as Appellant. The State of Florida was the prosecuting authority below and will be referred to as Appellee or the State.

The following symbol will be used in this Brief followed by the appropriate page number(s) in parentheses:

"R" -- Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The State accepts Appellant's statement of the case. The following statement of facts is submitted because Appellant's statement of facts is not written in a light most favorable to sustain the trial court's rulings.

The State's first witness at trial was Pensacola Police Officer Paul Ferguson who testified that his place of duty was the Pensacola Regional Airport (R 105). He was working the midnight shift on February 26, 1983, when he observed Appellant and a white female walking around the terminal. He asked them for identification and Appellant identified himself as Raymond Sanders and provided a government vehicle identification card in that name (R 107). Appellant told Ferguson that he was waiting for a flight, and Ferguson did not see either Appellant or the woman after he left work at 8:00 a.m. that morning (R 109). Ferguson testified that when he came to work that evening, he observed a West Hill Cab which was parked on the side of the road near Tippen Avenue just prior to midnight (R 110).

According to Ferguson, when he first saw Appellant, Appellant was wearing a brown cowboy hat and glasses, and Appellant had a moustache and a stubble of a beard (R 111).

Mary Louise Kirkland, a cab driver with the West Hill Taxi Company, testified that on February 26, 1983, she was working the

airport between 10 a.m. and 12 p.m. (R 117). She observed Appellant and a rather fat, long haired white woman get into the victim's [Herman Hugley] cab between 6:30 and 7:00 p.m. (R 118, 119).

Rosemary Kirkland, the dispatcher with West Hill Taxi Company, testified that she was working on the afternoon and evening of February 26, 1983, and that the victim had notified her about 6:30 p.m. that he was taking two people he had picked up at the airport to Pensacola Beach (R 121). About 7:15 p.m., the victim notified her that they were going to Fort Walton Beach, however twenty minutes later he called and told her they were instead going to Panama City (R 121). Around 11 p.m. that same evening, the victim called her and told her he had just returned, but when she tried to call him back she received no response (R 122).

The State's next witness was Soliver Dolby, a Security Supervisor assigned to the Pensacola Junior College main campus (R 124). He testified that he had not seen the taxi cab around 11 p.m. although he probably would not have noticed it because there were always other cars in the area. He first noticed the taxi approximately 4:20 a.m. the next morning when he saw police cars and flashing lights (R 125).

Roy Duggen testified that around 11:30 p.m. on the 26th, he was returning home from a Boy Scout banquet with his wife and daughter when he noticed a white cab which was parked in an unusual manner on Tippen Street (R 128). He remembered the incident because he had

mentioned to his wife that the cab was parked in a place in which you would never see a vehicle (R 128).

Mary Beasley, another cab driver with West Hill, testified that she last saw the victim between 6 and 6:30 p.m. on the evening of the 26th. She did not see anyone get into the victim's cab because she was in line in front of the victim's cab (R 131). She next saw the victim's cab approximately 4 a.m. the next morning when she noticed that it was parked in an unusual manner on Tippen Avenue (R 131). She stopped her vehicle and went to the victim's cab, and when she determined that something was wrong with Mr. Hugley, she called for assistance (R 132). She testified that if she were going to drive a fare to Panama City, she would collect the money in advance and that a driver could also collect a half fare returning to Pensacola (R 134). A round trip would be worth approximately $135 (R 135). On cross-examination, she testified that "we are supposed to collect the money before we go out of town" and that she would definitely collect the money first if two people wanted her to drive that long a distance (R 136).

Pensacola Police Officer Larry Giles testified that he was on duty the evening of the murder and that he had seen the victim's taxi parked alongside the road and had thought that it was strange for a taxi to be parked at that location at that time of the morning (R 140). He didn't have time to stop because he was on the way to

the scene of an accident, but he did shine his spotlight around the area to see if anyone was walking around. While he was at the scene of the accident, he told another officer about what he had seen and that officer went to investigate (R 140). He secured the crime scene until other officers could arrive (R 143).

Investigator Gary Meisen of the Pensacola Police Department testified that during his investigation of the crime, he learned from Jackie Humel that the people she had seen at the airport with the cab driver the evening of the murder might be hitchhiking on I-10 just outside Pensacola (R 149). Appellant and Laura Eutzy were apprehended on I-10 shortly thereafter. A pistol was taken from Laura Eutzy, and Meisen realized that it was the same caliber as the murder weapon (R 151). The pistol was sent to Tallahassee for testing that day. Meisen was contacted later that same afternoon by David Williams of the Florida Department of Law Enforcement who told him that the weapon taken from Laura Eutzy was positively the murder weapon (R 152).

Jackie Humel testified that she worked at the airport as part of a cleaning crew and that she was working the 5 p.m. to 11 p.m. shift on the 26th of February. Mark Miller pointed out two persons to her--the male had a cowboy hat, black hair behind his ears, and glasses. The woman was stout, had long black hair, and was wearing a jacket. The man was wearing jeans and a flannel shirt (R 156). After she got off work she was driving on Tippen Avenue when she saw

the victim sitting in his cab. She stopped to see if he was all right, and he replied that his vehicle was not broken down and that he was waiting on someone. The person he was waiting on was leaning inside the door and she recognized him as the same person she had seen earlier at the airport (R 157, 158).

The next witness was James Richbourg, a Pensacola Police Officer, who testified that he investigated the crime scene and collected an expended cartridge from the left rear floorboard of the taxi (R 163). He was present at the autopsy and took custody of a bullet which was removed from the victim's body (R 167). He also assisted Jackie Humel in preparing a composite of the man she had seen with the victim (R 166).

Charles Meadows, a Security Officer for the Pensacola Holiday Inn, testified that approximately 11 p.m. on the evening of the 26th, he saw Laura Eutzy. He identified Appellant as the man he had seen the next day (R 180). Pensacola Police Officer James Duck testified that he apprehended Appellant and Laura Eutzy while they were hitch-hiking on the interstate (R 190) and took a pistol away from Laura Eutzy after she told him that she had a gun in her purse (R 191).

Laura Eutzy then testified that she and Appellant had arrived in Pensacola approximately 10:30 p.m. on the evening of February 25, 1983 (R 195). They were on the way to Missouri which was where her mother lived. After spending approximately one hour at the Holiday Inn at the University Mall, they walked to the airport (R 196).

They stayed there all day Saturday just waiting around (R 197, 198).

She explained that she owned a handgun and that it had been bought in Slidell, Louisiana, after Appellant told her that she needed one for protection (R 198). Appellant helped her select the gun and told her it was a woman's gun (R 198, 199). She testified that she had the gun in her possession when she arrived in Pensacola and that she thought that it was located in her purse.

Approximately 7 p.m. on the evening of February 26, she and Appellant caught a cab at the airport and started for the Holiday Inn at Pensacola Beach (R 200). However, instead of going to Pensacola Beach, they first headed for Fort Walton Beach but then changed plans and headed for Panama City (R 201). She testified that she was asleep in the back seat of the taxi cab most of the trip and that she thought the gun was in her possession at that time (R 201). When they returned to the Holiday Inn at University Mall in Pensacola, she left the cab and went to the bathroom. Appellant told her that he would be in in a few minutes, and he returned approximately thirty minutes later (R 202, 203). She had no money in her possession while she was riding in the taxi, and she believed that Appellant had approximately $5.00 (R 203). She did not know how the cab fare would be paid, but Appellant told her that "he would take care of it." (R 204) When Appellant returned, he told her he hadn't taken care of the fare, and he told her that he had hit the cab driver and knocked him out but had not hurt him. They spent the rest of that evening at the Holiday Inn, the next day at the Mall, and the next

evening again at the Holiday Inn (R 204).

On Monday morning, she obtained a newspaper and Appellant attempted to take it away from her. When she asked him why, he told her that there was nothing in it that she could not read and gave the paper back to her. She then read the headline that the cab driver had died and when confronted with this information, Appellant insisted that he didn't want to talk about it (R 205). Appellant told her that he had not informed her of what had happened to the cab driver because he didn't want her to worry about it and he thought that she might turn him in to the police (R 205). She also testified that she would have turned Appellant in but that he would not let her out of his sight (R 206).

While they were still at the Holiday Inn on Monday morning, Appellant gave the pistol back to her. She claimed that she had not opened her purse at any time between Saturday night and Monday morning and that she had not noticed that the gun was missing (R 207). She admitted giving inconsistent statements when first confronted with her involvement in the crime, but she stated that she did this because she was afraid of Appellant (R 209).

The next witness was the pathologist, Dr. James Potter. He testified that he performed an autopsy on the victim and that the cause of death was a gunshot wound to the head (R 241). On cross-examination, he testified that the bullet had entered just slightly behind and above the victim's ear (R 241).

Florida Department of Law Enforcement Analyst David Williams, testified that the bullet which was in evidence had been fired from the gun which was in evidence (R 248). According to Williams, the test pound pull on the trigger of the gun was a little bit harder than average (R 250). Because of the residue on the victim's cap, Williams estimated that the pistol had been fired from between three and six inches from the victim's head (R 251).

The State then rested its case, and Appellant moved for a judgment of acquittal (R 257). According to Appellant, there had been no evidence of a robbery or an attempted robbery and that a judgment of acquittal should be granted at least as to the portion of the indictment charging felony murder (R 257). The trial court disagreed and ruled that there was some evidence that Appellant owed a significant amount of money for the cab fare and that the victim was found with no money on his person (R 258). The trial court also noted that the cab driver was found dead with absolutely no money on his person and that circumstantially robbery could be proven (R 258, 259). The prosecutor noted that there had been evidence that Appellant had used force and that it should be a jury question whether robbery was applicable to the case (R 259). The court agreed and denied the motion.

After closing arguments, the trial court instructed the jury. The record reveals that no objections were made by defense counsel concerning the jury instructions and that the only comments made

were in response to the trial court's question whether there were any comments about the instructions. Specifically, defense counsel stated "I'm satisfied." (R 294)

During deliberation over the verdict, the jurors requested that they be re-instructed on the definitions of second and third degree murder (R 295). Even though the jury was subsequently re-instructed on those definitions, the jury returned a verdict of guilty of first degree murder as charged (R 305).

During the sentencing phase of the trial, the State's first witness was Jack Shiver from the Escambia County Division of Corrections (R 311). He testified that after Appellant was arrested, he told him that he had been previously convicted and sentenced to prison for the crimes of forgery and auto theft (R 315). Appellant's prior robbery conviction was admitted into evidence over Appellant's objection that there had been no testimony or evidence to tie Appellant to the 1958 conviction (R 321). The objection was overruled because of the previous testimony that Appellant had admitted such a conviction (R 321).

The State rested and the defense presented no evidence or testimony (R 322). After argument by counsel and instructions by the court, the jury recommended a life sentence (R 335).

The trial court found that there were three aggravating circumstances in the case. First, the trial court found that Appellant

had previously been convicted of robbery, a crime involving the use or threat of violence. Second, the trial court found that Appellant had either robbed the victim or was attempting to rob the victim when the murder occurred and that the aggravating circumstance of §921.141 (5)(d) was applicable (R 340). Finally, the trial court found that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification and thus the aggravating circumstance of §921.141(5)(i) was applicable. The court found that there were no mitigating circumstances applicable and that nothing in mitigation had been presented in either the guilt or sentencing portions of the trial (R 341). The trial court then imposed a sentence of death (R 341).

ARGUMENT

ISSUE I

THE TRIAL COURT'S REJECTION OF THE JURY'S LIFE RECOMMENDATION IS SUPPORTED BY THE EVIDENCE IN THE RECORD.

Appellant first contends that the trial court improperly overrode the jury's recommendation of life imprisonment. Appellant, citing to Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), has argued that since the jury recommended life, this is a case for which no reasonable person could differ as to what the punishment should be. However, the fallacy behind Appellant's argument is that a jury recommendation of life imprisonment, followed by a trial court's imposition of the death penalty, would never be allowed to stand.

Florida's capital sentencing process has been specifically upheld by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In fact, the court noted that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since the trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." Id. 428 U.S. 252, 49 L.Ed.2d 923. See also Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134, 1145 (1983).

Appellant has cited numerous cases to support his contention that a death sentence was improper in this case. Obviously, space limitations prevent distinguishing each case on its facts--suffice it to say, however, that most of the cases relied upon by Appellant unlike Appellant's case, contained either non-statutory mitigating evidence in the record or the trial court's specific finding of a statutory mitigating circumstance. See, e.g., Cannady v. State, 427 So.2d 723 (Fla. 1983). In that case, one of the three statutory aggravating circumstances was rejected by this Court and there were two statutory mitigating circumstances which were applicable. Also, there was evidence of non-statutory mitigating evidence in the record. However, in Appellant's case, there was nothing in mitigation, either statutory or non-statutory, and three aggravating circumstances were found. Under those circumstances, as Appellant has recognized, a death sentence is proper. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Appellant's reliance on Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982), is misplaced for the same reason as is his reliance on Cannady. In Gilvin, unlike Appellant's case, there was evidence of non-statutory mitigating circumstances upon which the jury's life recommendation could have been based. Also, there was an improper doubling up of aggravating circumstances. Under those circumstances, reasonable men could differ--again, in Appellant's case, there was nothing in mitigation, either statutory or non-statutory and the trial court found three statutory aggravating circumstances.

Appellant's reliance on Washington v. State, 432 So.2d 44, 48 (Fla. 1983), is similarly misplaced. In that case, not only did the prosecutor himself ask that the jury's life recommendation be followed, but also there were two statutory mitigating circumstances as well as non-statutory mitigating evidence which had been introduced by the defense. Also, one of the aggravating circumstances was rejected by this Court. While the list of distinguishable cases could go on for many more pages, the State submits that the point has been made.

Appellant's theory that a jury recommendation of life can be sustained only if the aggravating circumstance of §921.141(5)(h), Fla. Stat., is interesting, but it is not supported by the statute which lists eight other aggravating circumstances, only one of which is necessary to sustain a death sentence. State v. Dixon, supra.

Appellant seems to be arguing that since this wasn't a very grisly murder, a death sentence is inappropriate. The State emphatically disagrees--there was absolutely no reason for Appellant to have murdered a defenseless cab driver. If as Appellant has contended, there was no money involved, that is all the more reason why this crime is reprehensible. While the undersigned is certainly not saying that it is all right to murder for money, at least there is a perverted reason for the killing. Moreover, if Appellant were correct that a killing had to be sloppy, bloody, or gruesome, in order to

sustain a jury override, would that mean that efficient, skillful murderers who manage to kill with only one bullet are rewarded for an especially antiseptic murder? Obviously not.

Appellant has also based his argument on the fact that the State did not even attempt to argue the applicability of §921.141(5)(h). Is Appellant seriously suggesting that a prosecutor should argue the applicability of a statutory aggravating circumstance which this Court would not uphold? The prosecutor should be commended for arguing that only three statutory aggravating circumstances should be found.

Appellant has also argued that the jury might have recommended life because it did not believe Laura Eutzy's testimony that she was unaware that Appellant had taken the gun from her. This is speculation at best--the fact that Laura Eutzy knew that Appellant had taken the gun has absolutely nothing to do with the circumstances of the crime and Appellant's degree of culpability. It is Appellant's culpability which is at issue here, and it should make no difference as to Appellant's sentence whether Laura Eutzy knew that Appellant had the gun. In fact, it would make a death sentence even more appropriate for Appellant if he asked for the gun a day prior to the crime.

But all this is speculation, and the State doesn't want to be guilty of the same speculation for which Appellant has been criticized.

The point is that there were three aggravating circumstances and nothing in mitigation, either statutory or non-statutory. Under these circumstances, reasonable men certainly could differ. The trial court's sentence is supported by the record and the law.

In summary, there was a finding by the trial court of multiple aggravating circumstances. The trial court also found that there was nothing in mitigation, either statutory or non-statutory. Under these circumstances, even when a jury recommends a life sentence, the Court has upheld the trial court's decision to impose a death sentence. See, e.g., Routly v. State, 440 So.2d 1257, 8 F.L.W. 388, 391 (Fla. 1983). Appellant should not be persuasive on this point.

ISSUE II

THE TRIAL COURT'S FINDING OF THE AGGRAVATING CIRCUMSTANCE OF §921.141(5)(i), FLA. STAT., IS SUPPORTED BY THE RECORD.

Appellant next contends that the trial court should not have found that the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The State disagrees and submits that the trial court's finding of this aggravating circumstance is supported by the record.

This particular aggravating circumstance was added to the death penalty statute by the Legislature in 1979 in response to this

Court's opinions in Riley v. State, 366 So.2d 19 (Fla. 1978), and Menendez v. State, 368 So.2d 1278 (Fla. 1979). Both of those cases involved execution type killings and in both the Court emphasized that the proof had not been strong enough to show that the murder was committed for the purpose of avoiding arrest within the contemplation of the death penalty statute.[1]

The State submits that if ever there were an execution type killing, this is the case. Counsel for Appellant has repeatedly argued that there was no evidence of a robbery and that the State did not prove the reason for the murder (Brief of Appellant at 31). However, those are the precise reasons why this murder was cold, calculated, and premeditated without any pretense of moral or legal justification. There simply was no reason for Appellant to kill the cab driver, perhaps, other than the fact that Appellant was just plain mean and vicious. The victim was shot in the side of the head from a distance of approximately three to six inches--a classic execution style killing. Moreover, there were no signs or evidence of a struggle prior to the shooting, and Appellant certainly did not offer a theory of self defense. There was evidence that Appellant planned to "take care" of the cab fare, and he did this after letting Laura Eutzy get out of the cab at the Holiday Inn.

Although Appellant has argued that there was insufficient proof of premeditation, Appellant has also recognized that the type and location of the wound "is circumstantial proof of premeditation ...." (Brief of Appellant at 31) The State submits that this factor,

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[1] A copy of the Staff Analysis of Senate Bill 523 has been appended to this brief.

coupled with Appellant's taking the gun from Laura Eutzy sometime at least prior to the last cab drive and the fact that Appellant was seen near the cab after he had caused the victim to drive the cab to a secluded area, is more than sufficient to justify the added amount of premeditation required under this Court's decisions. See Routly v. State, supra; Smith v. State, 424 So.2d 726 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Appellant's reliance on Cannady v. State, supra, to support his argument that this aggravating circumstance should not have been found is misplaced. This is because in Cannady there was evidence of self defense in that the defendant claimed he had not meant to commit the murder and that he had acted in self defense after the victim jumped at him. Id. 427 So.2d 730. In Appellant's case, however, there was no claim of self defense, and there was absolutely no evidence of any reason to justify the murder of the cab driver. Appellant has also relied on Washington v. State, 432 So.2d 44, 48 (Fla. 1983). However, in that case the Court found that there was no proof of additional premeditation--in Appellant's case, there was proof that Appellant procured the weapon sometime prior to the last cab-ride, let off Laura Eutzy so that she could not see the murder, caused the cab driver to drive to a remote location out of normal view of passersby, and finally shot the victim in a manner which even counsel for Appellant has recognized supports proof of premeditation. The State submits that this aggravating circumstance is

amply supported by the record and evidence adduced at trial and that the trial court properly found that the murder was committed in a cold, calculated, premeditated manner without pretense of moral or legal justification (R 376, 377).

ISSUE III

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN THE COURSE OF AN ATTEMPTED ROBBERY.

Section 921.141(5)(d), Fla. Stat., reads in its entirety:

> The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb. (Emphasis added)

This aggravating circumstance does not require that there must be actual proof of a robbery. Rather, all it requires is a factual finding that the defendant was attempting to rob when the murder occurred. According to Appellant, this aggravating circumstance should not have been found because there was no proof that the victim had ever had any money on his person prior to the murder. In other words, Appellant's conduct should be excused because the victim had no money. However, this argument fails in light of the Legislature's clear intent to make the aggravating circumstance applicable to

attempted felonies as well as completed felonies.

Notwithstanding the fact that there was clear proof of an attempted robbery, the State submits that circumstantially the evidence was sufficient to show that a robbery had occurred. This is because the jurors could use their common sense to infer the fact that the cab driver who had been working that day prior to picking up Appellant and Laura Eutzy certainly must have had some money on his person. Of course, as the trial court found, there was no money on the victim's body when it was discovered (R 376). See Knight v. State, 402 So.2d 435, 436, n. 2 (Fla. 3rd DCA 1981) (victim found dead from strangulation and battering and his wallet and contents were missing); Ferguson v. State, 417 So.2d 631, 635 (Fla. 1982) (murder victims had had jewelry and valuables on their persons before they were killed although no jewelry or valuables were ever recovered).

Finally, there was evidence in the record that the cab ride was worth between $90 and $135. Since the victim had no money on his person when his body was discovered, the trial court could properly find that Appellant had actually committed a robbery. See Ferguson, supra. The trial court also found that the fact that Appellant procured the weapon at least prior to the last cab ride demonstrated Appellant's intent to rob (R 376). Accordingly, there actually was a robbery in fact as the trial court found.[2]

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[2] Contrary to Appellant's argument, the jury's finding of premeditated murder does not constitute an implied acquittal of the robbery because felony murder was not found. The jury was instructed that they could find Appellant guilty of either premeditated or felony murder, but not both (R 294). The evidence supported both theories.

In summary, this aggravating circumstance includes attempts to rob as well as actual robberies. In the alternative, there was sufficient circumstantial evidence to demonstrate that the victim was robbed of his money at some time prior to Appellant's fleeing the scene of the crime. Finally, there was evidence in the record to support the trial court's finding that Appellant stole at least the value of the cab ride from the victim. Accordingly, Appellant's argument should be rejected.

ISSUE IV

THE ISSUE OF WHETHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE PENALTY PHASE WERE CONSTITUTIONALLY ADEQUATE HAS NOT BEEN PRESERVED FOR APPEAL.

Counsel for Appellant has recognized that there was no objection to the jury instructions as given (Brief of Appellant at 39), yet he has raised the issue anyway. The State submits that because of the lack of an objection, the issue has not been preserved for appeal. Williams v. State, 414 So.2d 509, 511 (Fla. 1982); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982); Castor v. State, 365 So.2d 701, 703 (Fla. 1978); State v. Barber, 301 So.2d 7 (Fla. 1974). The State respectfully requests that the Court not rule on the merits of this issue in order to preserve the State's waiver argument for use during future federal habeas review which is certain to come regardless

of how the Court ultimately decides this case. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Assuming only for the sake of argument that the Court wishes to consider the issue, it should be noted that Appellant's jury was given the standard jury instructions which have been approved by the Court on numerous occasions. See, e.g., Vaught v. State, 410 So.2d 147, 150 (Fla. 1982). Since there was absolutely no evidence of mitigation either during the guilt phase or the sentencing phase, the trial court was not required to instruct on the statutory mitigating circumstances. This was especially true in light of defense counsel's acquiescence to the instructions as given. See Cooper v. State, 336 So.2d 1133 (Fla. 1976). Finally, it should be pointed out that what the trial court did when it cautioned the jury that it could look to the guilt phase for factors in mitigation was for the benefit of Appellant. How then can a different lawyer now be complaining?

The issue was clearly not preserved for appeal, and this Court should not consider it. Appellant's argument is without merit.

ISSUE V

THE ISSUE OF WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS APPLIED BECAUSE OF THE TRIAL COURT'S AUTHORITY TO OVERRIDE A JURY'S RECOMMENDATION WAS NOT PRESENTED TO THE TRIAL COURT AND IS THUS NOT COGNIZABLE ON APPEAL.

Counsel for Appellant has once again raised an issue which was not presented to the trial court. Consequently, since this issue could have been raised prior to trial, the issue has been waived and is not properly before the Court. Steinhorst, supra; Castor, supra; Williams, supra; and State v. Barber, supra. This issue does not involve "fundamental error" and Appellant has not offered any "cause and prejudice" to excuse his procedural defaults in the trial court. It should be noted that trial counsel filed numerous pre-trial motions challenging the death penalty statute and procedures (R 345-373)--the reason this issue was not raised was probably because, as appellate counsel has recognized, the issue has been decisively repudiated by both this Court and the United States Supreme Court. See, e.g., Proffitt v. Florida, supra; Cannady, supra.

The undersigned wishes to make it clear to the Court that by asking for a finding of procedural default whenever such a finding is applicable, the State is not "playing games" in order to frustrate federal habeas review--this was a concern expressed by one of the members of this Court during oral argument of a recent capital case in which the undersigned participated. The Court must certainly be aware of the growing abuse of the writ of federal habeas corpus,

especially in capital cases. See Sullivan v. Wainwright, ___ U.S. ___, 78 L.Ed.2d 210, 213 (1983). In such cases, the scenario usually consists of an issue which was not raised at trial at all, or was raised only cursorily, a state court's ruling on the merits and rejecting the claim, and then a federal court's taking the claim and either reversing the state court's decision or holding the case for a number of years. Although the defendant usually loses in the end, justice has been delayed when it should not have been. The United States Supreme Court has recognized that the federal writ of habeas corpus was not designed to allow a state prisoner to maintain perpetual litigation, and a growing body of case law on procedural default is evident. Wainwright v. Sykes, supra; Engle v. Isaac, supra. However, this law is applicable only if the issue is not considered by the state courts because of procedural default.

Accordingly, since Appellant is in clear procedural default on this issue, the State of Florida respectfully requests that such procedural default be explicitly found. While the undersigned is of the opinion that counsel who routinely raise issues on appeal which were not first preserved at trial should be excoriated, such defense counsel can hardly be blamed for their conduct when it more often than not results in a ruling on the merits. This Court should not have to tolerate sifting through a multitude of claims in order to find the claims which were first properly raised in the trial court--such abuse of the system is not fair to the trial judge or the people of the State of Florida or the members of this Court.

CONCLUSION

Because there were three valid aggravating circumstances and nothing in mitigation, the trial court properly overrode the jury's recommendation of life imprisonment. The State of Florida respectfully requests the Court to affirm Appellant's judgment and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Steven L. Bolotin, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 17th day of January, 1984.

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OF COUNSEL